152 U.S. 398

RECORD, CASE No. 14,040.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 107.

CHARLES G. MURPHY, PLAINTIFF IN ERROR,

vs.

ELISHA A. PACKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED MAY 19, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 5, 1893.

1 UNITED STATES OF AMERICA, } ss:
Western District of Pennsylvania, }

Seal of the U. S. Circuit Court, W. D. Penn.

Among the records of the circuit court of the United States for the western district of Pennsylvania, at Williamsport, it is, *inter alia*, thus contained, at No. 16, June term, 1884:

Appearance Docket Entries.

ELISHA A. PACKER, a Citizen of the State of New York, }
vs.
CHARLES G. MURPHY, a Citizen of the State of Pennsylvania. }

Summons in ejectment for a tract of land situate in the township of Conyngham, in the county of Columbia and western district of Pennsylvania, surveyed on the 21st day of October, A. D. 1794, in pursuance of a warrant granted by the Commonwealth of Pennsylvania to Nathaniel Brown, bearing date the 26th day of November, A. D. 1793, bounded on the north by lands surveyed on warrants granted to Mary Ruston and John Young; on the east by
2 land surveyed on warrant to Ebenezer Branham; on the south by lands surveyed on warrants granted to Robert Jordan and Andrew Porter, and on the west by land surveyed on warrants to Thomas Ruston and Lewis Walker, containing four hundred and sixty-two acres and thirty perches, more or less, with the appurtenances.

Issued May 26, 1884. Returnable the third Monday of June, 1884. Præcipe and description filed May 26, 1884.

June 10, 1884.—Served summons in ejectment, as within commanded, on Charles G. Murphy by informing him of the contents and leaving a true and attested copy of the same at his dwelling-house with an adult member of his family. So ans. James S. Rutan, U. S. marshal, per L. H. Martin, dep'y. $7.35. June 17, 1884, filed plaintiff's "brief of title." June 17, 1884, Samuel Knorr, Esq., appears for defendant and pleads "not guilty." Same day, appearance and plea filed. September 11, 1885, filed defendant's "brief of title." Same day, the trial of this cause continued by consent. September 18, 1886, the trial of this cause at September term, 1886, by mutual consent of counsel for the parties, is marked continued. September 19, 1887, the trial of this cause continued by consent of counsel for plaintiff and defendant.

And now, September 18, 1888, this cause came on to be tried, and a jury of the country being called came, to wit, John H. Kennedy, James W. Carothers, Adam Erlewine, Levi Light, James H.
3 Barker, M. Weyand, O. W. Banister, A. H. Frisbee, Frank E. Aikens, J. W. Jack, J. P. McCollom, and S. M. Foresman, twelve good and lawful men of the western district of Pennsylvania, who, having been duly summoned, returned, balloted for, and em-

panelled, were severally sworn or affirmed well and truly to try the issue herein joined. Counsel for defendant offer to prove, *pro ut* defendant's offer No. 1. Counsel for plaintiff object, *pro ut* objections filed. Objections sustained, evidence rejected, and bill sealed for defendant. M. W. Acheson. Counsel for defendant offer to prove, *pro ut* defendant's offer No. 2. Counsel for plaintiff object, *pro ut* objections filed. Objections sustained, evidence rejected, and bill sealed for defendant. M. W. Acheson. Counsel for defendant offer to prove, *pro ut* defendant's offer No. 3. Counsel for plaintiff object, *pro ut* objections filed. Objections sustained, evidence rejected, and bill sealed for defendant. M. W. Acheson.

Counsel for plaintiff and defendant respectively submit written requests to the court to charge the jury as therein contained; which said requests are duly filed.

And now, September 19, 1888, the jury aforesaid, on their oaths and affirmations aforesaid, respectively do say that they find a verdict in favor of the plaintiff and against Charles G. Murphy, the defendant, for the land described in the writ, with six cents damages and six cents costs; and so say they all. Before verdict rendered counsel for the defendant except to the charge of the court.

4 Same day, plaintiff's bill filed, amounting to $46.60; whereupon it is considered, adjudged, and decreed by our said circuit court of the United States for the western district of Pennsylvania that the said Elisha A. Packer, plaintiff, do recover from the said Charles G. Murphy, defendant, as well the land mentioned and described in the writ as also his costs and charges in this behalf expended, which said costs and charges amount to the sum of ninety-two dollars and thirty-five cents; whereupon judgment is accordingly entered.

And the said defendant, in mercy, &c.

Judgment signed September 20, 1888.

B. S. BENTLEY, *Clerk.*

February 23, 1889.—Bond of Charles G. Murphy, principal, with M. G. Hughes, surety, in the sum of one thousand dollars, conditioned for prosecuting writ of error taken in this case with effect, &c., filed. Same day, bond approved by M. W. Acheson, judge. Writ of error issued February 23, 1889. Same day, exit citation to Elisha A. Packer, defendant in error, to be and appear at the next term of the Supreme Court of the United States, to be holden at the city of Washington, D. C., commencing the second Monday of October, A. D. 1889. March 5, 1889, service of citation accepted by John W. & James Ryon, attorneys for Elisha A. Packer, defendant in error.

5 *Copy of Præcipe for Summons.*

In the Circuit Court of the United States of America for the Western District of Pennsylvania, Sitting at Williamsport, Pa., of June Term, 1884.

ELISHA A. PACKER, a Citizen of the State of New York,
vs.
CHARLES G. MURPHY, a Citizen of the State of Pennsylvania. } No. 16.

Issue summons in ejectment against Charles G. Murphy, the defendant, a citizen and resident of the western district of Pennsylvania, to answer the complaint of Elisha A. Packer, the plaintiff, a citizen of the State of New York, that the defendant hath now in his actual possession a tract of land situate in the western district of Pennsylvania, in the township of Conyngham, in the county of Columbia and State of Pennsylvania, surveyed on the 21st day of October, A. D. 1794, in pursuance of a warrant granted by the Commonwealth of Pennsylvania to Nathaniel Brown, bearing date the 26th day of November, A. D. 1793, bounded on the north by lands surveyed on warrants granted to Mary Ruston and John Young; on the east by land surveyed on warrant granted to Ebenezer Branham; on the south by lands surveyed on warrants granted to Robert Jordan and Andrew Porter, and on the west by land surveyed on warrants to Thomas Ruston and Lewis Walker, containing
6 four hundred and sixty-two acres and thirty perches, more or less, with the appurtenances, the right of possession or title to which the plaintiff says is in him and not in the defendant, and the plaintiff avers and says that the value of the said tract of land or matter in dispute exceeds the sum of ten thousand dollars.

Returnable to the next term.

JOHN W. & JAMES RYON,
Attorneys for the Plaintiff.

To B. S. Bentley, Esq., clerk circuit court U. S., western district, at Williamsport, Pa.

Endorsed: C. C. U. S., W. D. Pa. No. 16. June term, 1884. Elisha A. Packer, a citizen of the State of New York, *vs.* Charles G. Murphy, a citizen of the State of Pennsylvania. Præcipe for summons in ejectment. Filed May 26, 1884. John W. & James Ryon, for plaintiff.

7 *Copy of Summons.*

UNITED STATES,
Western District of Pennsylvania, } *sct:*

The President of the United States to the marshal of the western district of Pennsylvania, Greeting:

We command you that you summon Charles G. Murphy, a citizen of the State of Pennsylvania, late of your district, if he may be found

therein, so that he may be and appear before the judges of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court, to be holden at Williamsport, on the third Monday of June next, then and there to answer a certain complaint made by Elisha A. Packer, a citizen of the State of New York, that the said Charles G. Murphy now has in his possession actual a tract of land situate in Conyngham township, Columbia county and State of Pennsylvania, surveyed on the 21st day of October, A. D. 1794, in pursuance of a warrant granted by the Commonwealth of Pennsylvania to Nathaniel Brown, bearing date the 26th day of November, A. D. 1793, bounded on the north by lands surveyed on warrants granted to Mary Ruston and John Young; on the east by land surveyed on warrant granted to Ebenezer Branham; on the south by lands
8 surveyed on warrants granted to Robert Jordan and Andrew Porter, and on the west by land surveyed on warrants to Thomas Ruston and Lewis Walker, containing four hundred and sixty-two acres and thirty perches, more or less, with the appurtenances, the value of which the said Elisha A. Packer avers exceeds the sum of ten thousand dollars, the right of possession or title to which he, the said Elisha A. Packer, saith is in him and not in the said defendant; all of which said plaintiff averreth and is prepared to prove before our said court. Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, at Williams-
[SEAL.] port, this twenty-sixth day of May, A. D. 1884, and in the one hundred and eighth year of the Independence of the said United States.

B. S. BENTLEY, *Clerk.*

June 10, 1884.—Served summons in ejectment, as within commanded, on Charles G. Murphy by informing him of the contents and leaving a true and attested copy of the same at his dwelling-house with an adult member of his family.

So ans.—

JAMES S. RUTAN,
U. S. Marshal,
Per L. H. MARTIN, *Dep'y.*

Marshal, $7.35.

Endorsed: C. C. U. S., W. D. Pa. No. 16. June term, 1884. Elisha A. Packer *vs.* Charles G. Murphy. Summons in ejectment. John W. & James Ryon, *p. q.*

9 *Copy Plaintiff's Brief of Title.*

In the Circuit Court of the United States, Western District Pennsylvania, Sitting at Williamsport.

ELISHA A. PACKER
vs.
CHARLES G. MURPHY. } No. 16. June Term, 1884.

Plaintiff's brief of title filed under the rules of the circuit court.

Warrant dated the 26th day of November, 1793, to Joseph Tyson for 400 acres of land lying one mile north from the road leading from Reading to Sunbury, adjoining Thomas Ruston's other lands, and the survey of the 22nd day of October, 1794, on the same for 453 acres and allowance, calling on the southeast corner for William Elliot and also on the south for Daniel Reese, the property of Dr. Ruston, and on the south Thomas Reese, Sr. It forms a triangle, and is nearly exactly west and calls for an ash, and on the north is vacant.

Also warrant dated the 26th day of November, 1793, to William Elliot for 400 acres of land adjoining lands granted to Cadwalader Evans, and the survey on the same of the 22nd of October, 1794, calling on the west for Joseph Tyson, on the north for Daniel Reese,
Charlotte Ruston, Mary Myers, and part of John Reynolds,
10 containing 368 acres and allowance, calling on the east for lands of Lewis Walker, on the south for Jesse Brooks (Dr. Thomas Ruston in the right of Jesse Brooks is the call), Josiah Evans, and Sarah Lane.

Also warrant dated the 26th day of November, 1793, to Lewis Walker for 400 acres, and the survey on the same of the 22nd day of October, 1794, containing 371.25 acres and allowance, calling on the west for William Elliot, north for part of John Reynolds, Thomas Billington, Mary Ruston, and Thomas Ruston, on the east for Nathaniel Brown, south for Robert Gordon, Peter Smith, Dr. Thomas Ruston in right of William Shannon, and a part of Jesse Brooks.

Also warrant dated the 26th day of November, 1793, for 400 acres, and the survey on the same, dated the 22nd of October, 1794, containing 415 acres and allowance, calling on the west for Jesse Brooks, on the north for Lewis Walker, on the east for Lewis Walker and Peter Smith, and on the south for Dr. Ruston in right of William Gilbert. The southeast corner is marked here as a chestnut oak and on the southwest as a pine.

Also warrant dated the 26th day of November, 1893, to Ebenezer Branham for 400 acres, and the survey on the same, dated the 21st day of October, 1794, containing 441¼ acres and allowance, no calling on the west; on the north calls for Joshua Bean, Samuel Lobdell, Daniel Reese, and John Houston, on the east is Steed-
11 man & Co., and on the south is Thomas Ruston, Jr., in the right of Lewis Walker, and for Andrew Porter.

Also warrant dated the 26th day of November, 1793, 400 acres, to Nathaniel Brown, and the survey on the same the 21st day of October, 1794; the quantity of the survey is 400 acres and allowance, and call for Lewis Walker on the west, Thomas Ruston on the north, Mary Meyers and John Young; on the east is Ebenezer Branham, on the south Andrew Porter and Dr. Thomas Ruston in the right of Robert Gordon.

A certificate of the surveyor general dated the 11th day of October, 1855, of the loss of the original return of survey of the William Elliot tract.

Old purchase voucher No. 12969.

26th November, 1793.

JOSEPH TYSON.	400 acres.
WILLIAM ELLIOT.	400 acres.
LEWIS WALKER.	400 acres.
WILLIAM SHANNON.	400 acres.
EBENEZER BRANHAM.	400 acres.
NATHANIEL BROWN.	400 acres.

Amount £60. Interest from date hereof.

A general receipt wrote.

Old purchase blotter No. 12969.

1794, June 14th, Dr. Ruston, 6 wts. of 400 ea. amo't 2,400
12 a 50 spct. pd. specie ch. £60; rect. d'd fees 60 p. pd. rem. ch. of 168 D's.

List of William Gray's return, headed 116, 1795, Feb. 23rd; William Elliot, 368 acres; also Lewis Walker, 371.5 acres; William Shannon, 415 acres; Nathaniel Brown, 400 acres.

Exemplification of record from the circuit court of the United States for Pennsylvania, made by the prothonotary of the eastern district, in the matter of James Clayland, for the use of John Gibson, *vs.* Thomas Ruston, No. 44, April sessions, 1796, in debt, and on the 20th of April, 1796, judgment, by consent, for $19,926.27; the *fi. fa.* issued August 31st, 1797, for real debt, 3,735 pounds 8 shillings and 4 & ½ pence. *Fi. fa.* returned *nulla bona.* 1798, April 10th, alias *fi. fa.*, Apr. sessions, returned *nulla bona.*

Circuit court of the United States, October sessions, 1801. No. 13. James Clayland, for the use of John Gibson, *versus* Thomas Ruston. *Scire facias* to revive judgment, originally 44, April, 1796, issued 31 of July, 1801. 1802, May 11th, judgment for the plaintiff by consent, six weeks' stay of execution. August 30th, same year, *fi. fa.* issued, real debt $9,961.10. This was returned *nulla bona.* October sessions, 1803, April 6th, alias *fi. fa.* (these are called *fi. fa. post scire facias*). The alias *fi. fas.* were returned, the condemnation and so forth is lost. October sessions, 1803. James Clayland, for the
13 use of John Gibson, *versus* Thomas Ruston. No. 11. Referred to the 13th of October sessions, 1801. 1803, May 24th, exit *ven. ex. sci. fa.*, real debt $9,961.10, interest from the 10th of October, 1794, and costs, $37.40. October sessions, *ven. ex.* returned money made $1,357.85, the *ven. ex.* reciting the alias *fi. fa.*, and the

levy upon Joseph Tyson and, among others, William Elliot, Lewis Walker, William Shannon, Ebenezer Branham, and Nathaniel Brown, as the property of Dr. Ruston. The return by the marshal — these tracts were sold to Nicholas Le Fevre. They are numbered 216, 217, 218, 219, and 221.

Exemplification of the deed of John Smith, Esq., marshal for the district of Pennsylvania, to Nicholas Le Fevre, dated the 11th of October, 1803, taken from the copy of the deed in the office of the clerk of the circuit court of the United States, being for the 8 tracts above named, to wit, Tyson, Elliot, Walker, Branham, Shannon, and Brown, acknowledged on the 11th day of October, 1803, with the receipt of the marshal for the consideration, recorded in Deed Book "B," pages 14, 15, 16, 17, and 18, in the clerk's office for the circuit court of the United States for Pennsylvania.

Exemplification of the will of Nicholas Le Fevre, dated the 21st day of February, 1815, at Philadelphia, probated the 14th day of August, 1815. Letters of administration issued to William
14 Smith, of the borough of Huntington, county of Huntington, attorney-at-law, dated the 14th of August, 1815. In a schedule attached to the will is a schedule giving the name of the tracts of land owned by him and the location; among others are the Joseph Tyson, 453 acres; the William Elliot, 368 acres in Northumberland county; Lewis Walker, 371.5; William Shannon, 415, and Nathaniel Brown, 400. Warrants dated the 26th day of November, 1793, and survey in October, 1794. In the schedule, under the head of marshal's property, opposite the Tyson, 210; opposite the Elliot, 217; opposite the Walker, 218; opposite the Shannon, 219, and opposite the Nathaniel Brown, 221; which numbers correspond with the numbers of the marshal's warrants.

Exemplification of the account of William R. Smith, administrator *cum testamento annexo* of Nicholas Le Fevre, deceased, sworn to the 2nd day of December, 1817, in the orphans' court, confirmed January 16th, 1818, *nisi*. Then follows the notice of creditors, dated December 17, 1817, proof of notice by John Moore on January 16th, 1818, settlement confirmed absolutely.

Exemplification of an account similar to the above filed in the register's office.

Exemplification of proceedings for the sale in the orphans' court. Petition of William R. Smith, administrator *cum testamento annexo* of Nicholas Le Fevre, deceased, for the sale of real estate of decedent, presented on the 15th day of
15 November, 1836, to the orphans' court of Philadelphia, containing a description of the real estate, and, among other things, these tracts and surveys, in the warrantee name of William Elliot, Nathaniel Brown, Lewis Walker, and William Shannon, in Columbia and Northumberland counties, which are presented in a schedule attached to the petition, and the courts decreed that the administrator should raise the sum of ten thousand dollars out of the real estate aforesaid, and then in the schedule, among other tracts described as belonging to Le Fevre, were the Tyson, Elliot, Walker, Shannon, Brown. Afterwards the orphans' court held on

the 20th of July, 1838, the following proceedings, to wit: Also the petition presented to the orphans' court of Northumberland county, and decree of the orphans' court of Northumberland county, held at Sunbury, for the county of Northumberland, on the first Monday, to wit, the second day, of January, 1837, before Hon. Ellis Lewis, president, and his associates, Jacob Gerheart and George Weiser, petition of Gen. W. R. Smith, of Bedford county, Pennsylvania, administrator *cum testamento annexo* of Nicholas Le Fevre, of the city of Philadelphia, was preferred to the court, humbly showeth that the orphans' court of the county of Philadelphia on the 15th day of November, 1836, authorized your petitioner to raise the sum of ten thousand dollars for the payment of the tes-
16 tator's debts by the sale of the real estate of the said testator situate in the counties of Lycoming, Northumberland, and Columbia, as by the decree of the orphans' court aforesaid, now exhibited, appears; that the said testator died seized of the following real estate in the county of Northumberland, to wit: One tract surveyed under a warrant in the name of Abraham Scott, in Shamokin and Little Mahanoy townships, containing 342 acres, more or less, adjoining lands in the name of John Cook, Samuel Scott, and Daniel Campbell and others, part of the tract surveyed under a warrant to Joseph Tyson, containing in all 453 acres, more or less, of which about 227 acres, more or less, are in Shamokin township, in said county. The said tract is intersected east and west by a branch of Roaring creek and adjoins lands in the name of William Elliot, Thomas Reese, and others; a tract conveyed under warrant to William Elliot, containing 368 acres, more or less, adjoining the above lands, in the name of Mary Myers, Lewis Walker, and others, on or near said Roaring creek, formerly in Catawissa, now in Shamokin township; a tract surveyed to Lewis Walker, containing 371 acres, more or less, adjoining the last tract, and lands in the name of John Reynolds, Nathaniel Brown, and others, on or near a branch of Roaring creek, formerly in Catawissa, now Shamokin
17 township; a tract surveyed to William Shannon, containing 415 acres, more or less, adjoining the last, and other lands, formerly in Catawissa, now in Shamokin township, in said county, and much of the tract formerly in Catawissa, township, surveyed to Nathaniel Brown, containing in all 400 acres, more or less, as lies in Shamokin township, in said county, supposed to be about 250 acres, more or less, adjoining the last-described tract and lands, in the name of Lewis Walker, Robert Irwin, and others. Your petitioner, therefore, prays the court to permit him to make sale of the lands above described for the purpose of raising the aforesaid sum of ten thousand dollars for the payment of the debts of the said administrator; whereupon, January 14th, 1837, the court decreed the whole of the lands to be sold.

Exemplification of the record of the orphans' court of Philadelphia, containing the recorded petition, decree, and docket entries thereon of the proceeding of William R. Smith, administrator *cum testamento annexo* of Nicholas Le Fevre, deceased, for the sale of his estate in Northumberland and Columbia counties. A similar peti-

tion was presented to the orphans' court of Columbia county for the sale of the Nathaniel Brown survey, and on the 17th January, 1837, the said court decreed the same to be sold.

Also the report of William R. Smith to the orphans' court of Philadelphia.

18 We will offer the whole of this proceeding, being duly certified by the clerk of the orphans' court of Philadelphia, dated the 12th day of October, 1855, certified to by W. Marshall Taylor the 28th of August, 1882, and by Judge Hanna and then by W. Marshall Taylor again as register of wills.

Deed dated the 9th day of May, 1837, William R. Smith, of Bedford county, in the State of Pennsylvania, administrator *cum testamento annexo* of Nicholas Le Fevre, of the city of Philadelphia, deceased, and Joseph Probst, Andover township, Columbia county and State of Pennsylvania, for William Elliot, Lewis Walker, William Shannon, and Nathaniel Brown, recites the presentation of these petitions and that it was officially confirmed on the 16th day of January.

Deed dated the 9th day of June, 1837, between Joseph Brobst and Anna, his wife, of the one part, and Hugh Bellas, of Sunbury, of the other part; consideration, $2,500; acknowledged the same day and recorded in Northumberland county, in Deed Book "C C," pages 65, 66, 67, 68, and 69, granting and conveying to Hugh Bellas the Abram Scott, William Elliot, Lewis Walker, William Shannon, and Nathaniel Brown surveys aforesaid.

Deed dated the first day of January, 1848, between Hugh Bellas, of Sunbury, Northumberland county, Pennsylvania, and Esther, his wife, to Cornelius Garretson, of the town of Danville,

19 county of Columbia and State of Pennsylvania; consideration, $13,114; recorded in Northumberland county January 5th, 1848, Deed Book "K," pages 180, '1, '2, granting and conveying to Cornelius Garretson the William Elliot, Lewis Walker, William Shannon, and Nathaniel Brown surveys aforesaid.

Deed dated 15th day of September, 1856, Hugh Bellas and wife to Cornelius Garretson, recorded in Columbia county November 15, 1856, Deed Book "M," page 525, for 62 acres and 123 perches, being part of two original tracts in the warrantee names of Lewis Walker and Nathaniel Brown, situate in Mt. Carmel township, Northumberland county, and in Roaring Creek township, Columbia county.

Deed dated 13th day of February, 1849, between Cornelius Garretson, at Danville, Pennsylvania, and Mary, his wife, to Alexander Garretson, of the same place, of the other part, for the undivided half of these four tracts, the description being the same as contained in the deed from Hugh Bellas to Cornelius Garretson, recorded in Northumberland county April 21st, 1864, in Deed Book "W W," pages 94, 95, and 96, and Columbia county on June 6, 1849, in Deed Book "L," page 65.

Exemplification of the last will and testament of Alexander Garretson, deceased, dated 16th of June, 1849, with letters testamentary to Jacob and Edmund Garretson, executors.

20 Exemplification of the last will and testament of Cornelius Garretson, deceased, probated on the 20th day of December, 1863, and letters testamentary to Timothy O. Venallan and Jacob Garretson, executors.

Deed dated the 18th day of April, 1864, between Jacob Garretson, surviving executor of the last will and testament of Alexander Garretson, deceased, of the one part, and Rollin N. Rathbun, of the other part, for the same land described in the deed from Hugh Bellas to Cornelius Garretson, recorded in Northumberland county, in Deed Book "W W" or "U U," pages 99, 100, 101, April 21st, 1864, and in Columbia county, Deed Book "R," page —, 2nd of June, 1864.

Deed dated the 18th of April, 1864, Jacob Garretson and Timothy O. Venallan, executors of the last will and testament of Cornelius Garretson, deceased, to Rollin N. Rathbun, for the same four tracts as described in the deed from Hugh Bellas to Garretson, recorded in Northumberland county April 21st, 1864, in Deed Book "U U" or "W W," pages 96, '7, & '8, and in Columbia county June 2nd, 1864, Deed Book "R," pages 130, '1, & '2.

Declaration of trust dated 29th of April, 1864, for the four tracts in the warrantee names of William Elliot, Lewis Walker, William Shannon, & Nathaniel Brown, containing two thousand and
21 fifty-two acres and sixty perches, the eastern portion containing one thousand and fifty-three acres and twenty-seven perches, for the use of Geo. A. Fellows, Philip Dater, Robert H. Rathbun, Elisha P. Wilbur, and Robert Lockhart, and for the western portion and residue thereof, containing nine hundred and ninety-nine acres and thirty-three perches, to the use of Elisha A. Packer, James N. Benedict, John E. Rathbun, Joseph Colt, and George B. Newton.

Deed dated August 1st, 1864, Rollin N. Rathbun, trustee, of the first part, and George A. Fellows, of the city of New York; Philip Dater, Robert H. Rathbun, Elisha P. Wilber, and Robert Lockhart, of the second part, and the Columbia Coal Company, of the third part. Recorded in Columbia county, October 7th, 1865, in Deed Book "S," pages 265, '6, & '7.

Charter of incorporation of the Columbia Coal Company.

Letters patent dated May 7th, 1864.

Exemplification of record in court of common pleas of Northumberland county, No. 211, August term, 1871, George A. Fellows against The Columbia Coal Company; Aug. 14, 1871, judgment by default of appearance. *Fi. fa.* issued and return of no property on the premises. Alias *fi. fa.* tested the 6th day of December, 1880; levied upon the tract of land, among others, situated in Conyngham township, Columbia county, surveyed on the 21st of October,
22 1794, by virtue of a warrant dated the 26th of November, 1793, in the warrantee name of Nathaniel Brown, &c. Inquisition and condemnation, *ven. ex.* to the sheriff of Northumberland county to sell the same.

Deed of John B. Heller, high sheriff of Northumberland county, to George A. Fellows and Philip Dater, dated the 15th day of March,

1872, for the Nathaniel Brown survey. Acknowledged in open court, Northumberland county, on the 15th day of March, 1872; recorded in sheriff's Deed Book "D," pages 229 & 230.

Will and codicil of George A. Fellows, deceased, probated on the 29th of July, 1880, in surrogate court of the county of Rensselaer, State of New York, and letters testamentary of same date to Elizabeth L. Fellows, executrix.

Deed dated the 20th day of March, 1883, between Philip Dater and Elizabeth L. Fellows, executrix of the last will and testament of George A. Fellows, deceased, of the one part, and Elisha A. Packer, of the other part, for, among others, the Nathaniel Brown tract, described in the deed from John B. Heller to George A. Fellows and Philip Dater. Recorded in Columbia county, in Deed Book No. 36, page 408, &c., June 12th, 1883.

Assessment of Nathaniel Brown, William Elliot, Lewis Walker, and William Shannon surveys respectively as unseated lands
23 in Shamokin township, Northumberland —, from the year-1835 to 1839; that the taxes for those years were unpaid and were duly returned to the treasurer to be sold for taxes; that the treasurer of Northumberland county sold the same on the 13th day of June, 1840, to Charles Pleasants and acknowledged deeds therefor 16th of August, 1840.

Assessments of Nathaniel Brown as unseated lands in Roaring Creek township, Columbia county, for the years 1838 and 1839, 1840 and 1841; that the taxes for those years were unpaid and were duly returned to the treasurer to be sold for taxes; that the treasurer of Columbia county sold the same on the 13th day of June, 1842, to James Pleasants, and acknowledged a deed therefor 17th day of August, 1842.

Deed dated the 20th day of November, 1847, between James Pleasants, of the one part, and Charles Pleasants, of the other part, granting and conveyinrg to the said Charles Pleasants the Nathaniel Brown tract.

Deed dated the 2nd day of January, 1848, between Charles Pleasants and Elizabeth, his wife, of the one part, and Cornelius
24 Garretson, of the other part, granting and conveying to said Cornelius Garretson the William Elliot, Lewis Walker, William Shannon, and Nathaniel Brown surveys aforesaid.

Endorsed: C. C. U. S., W. D. Pa. No. 16. June term, 1884. Elisha A. Packer *vs.* Charles G. Murphy. Plaintiff's brief of title. Filed June 17, 1884. John W. & James Ryon, pl't'ff's att'ys.

25 *Copy of Appearance for Defendant and Plea.*

In Circuit Court of the United States for the Western District of Pennsylvania.

ELISHA A. PACKER
vs.
CHARLES G. MURPHY. } No. 16. June Term, 1884. Ejectment.

And the defendant, by Samuel Knorr, his attorney, appears and enters into the common rule and says that he is not guilty.
June 16, 1884.

SAMUEL KNORR,
Att'y for Def't.

Endorsed: C. C. U. S., W. D. Pa. No. 16. June term, 1884. Elisha A. Packer *vs.* Charles G. Murphy. Appearance and plea. Filed June 17th, 1884.

26 *Copy Defendant's Brief of Title.*

In Circuit Court of the United States, W. D. Pa.

ELISHA A. PACKER
vs.
CHARLES G. MURPHY. } No. 16. June Term, 1884.

Abstract of title relied upon by the defendant, filed under the rules of the circuit court.

1793, Nov. 26th.—Warrant to Nathaniel Brown for 400 acres of land on branch of Roaring creek, county of Northumberland.
1794, October 21st.—Return of survey of the same.
1797, April 13th.—Patent for same to Peter Grahl, reciting conveyance from Nathaniel Brown to Peter Grahl, dated 27th November, 1793. Assessments of Nathaniel Brown tract as unseated lands in Catawissa township, Columbia county, for the years 1826 and 1827; that the taxes for those years were unpaid and were duly returned to the treasurer to be sold for taxes; that the treasurer of Columbia county sold the same on the second Monday of June, 1828, to the commissioners of Columbia county.
1828, Aug. 8th.—Deed for same to the commissioners of Columbia county by the treasurer duly acknowledged.
1882, Aug. 31.—Minutes of commissioners of Columbia county of unseated lands. Warrantee or owners, Brown, Nathaniel;
27 t'w'p, Catawissa; date of sale to commissioners, 1828; number of acres, 400; amount sold for to the commissioners, $51.52; to whom sold, C. G. Murphy; amount sold for, $305, paid; deed made, Charles Reichart, B. F. Edgar, and Joshua Fetterman, commissioners offering this land for sale; the due advertisement of the sale, 1882, Sept. 18th; deed of Charles Reichart, B. F. Edgar,

and Joshua Fetterman, commissioners of Columbia county, to Charles G. Murphy for the Nathaniel Brown — aforesaid, reciting sale by the commissioners for the consideration of $305; acknowledged same day; purchase-money receipted.

Endorsed: C. C. U. S., W. D. Pa. No. 16. June term, 1884. Elisha A. Packer *vs.* Charles G. Murphy. Defendant's brief of title. Filed September 11, 1885.

28 *Copy Defendant's Offer of Evidence No. 1, &c.*

U. S. Circuit Court, W. D. Pa.

PACKER *vs.* MURPHY. } No. 16. June T., 1884.

Def't offers patent to Peter Grohl for the tract of land surveyed to Nathaniel Brown, dated 13th April, 1797, for the following purposes, to wit:

To show title out of the Commonwealth.

To show title out of the plaintiff.

To show that the purchase-money was not paid in full by Thomas Ruston.

The plaintiff objects to the evidence—

First. Because it is not competent for the defendant to read the patent with the recitals therein contained as against the plaintiff who claims under Dr. Ruston. The recitals in the patent are not evidence as against those claiming under Dr. Ruston.

Second. The defendant has not shown that Peter Grohl was entitled to take out the patent or that he paid any consideration whatever; as the case now stands the patent inures to the benefit of the plaintiff, and because the evidence is irrelevant and immaterial to the defendant's case.

Third. The marshal's sale of 1803 conveyed the whole interest to Le Fevre and entitled him to obtain the patent. The marshal's sale relates back to the date of the judgment in 1796, which is prior to the date of this patent and cuts off conveyances subse-
29 quent to the date of the commencement of the lien of this judgment.

Fourth. The defendant is a stranger to the patentee and any claim of title under it.

Objections sustained, evidence rejected, and bill sealed for defendant.

M. W. ACHESON. [SEAL.]

Endorsed: C. C. U. S., W. D. Pa. No. 16. June term, 1884. Elisha A. Packer *vs.* Charles G. Murphy. Defendant's offer of evidence No. 1. Plaintiff's objections and ruling of the court thereon. Filed September 19, 1888. B. S. Bentley, clerk.

30 *Copy Defendant's Offer of Evidence No. 2., &c.*

U. S. C. C., Western District of Pa.

PACKER
vs.
MURPHY. } No. 16. June Term, 1884.

Defendant offers sale book of commissioners of Columbia county, showing sale of Nathaniel Brown tract August 31, 1882, to C. G. Murphy, to be followed and taken in connection with deed of said commissioners to said C. G. Murphy, in pursuance of said sale, for said tract of land, dated 18th September, 1882; acknowledged same day.

The plaintiff objects to the defendant's offer, and assigns the following reasons in support of such objection:

1st. The evidence shows that the county commissioners of Columbia county assessed and charged the Nathaniel Brown — with taxes for the years 1838, 1839, & 1840 & 1841, and that, such taxes remaining unpaid, the said tract of land was returned to the treasurer of said county charged with such taxes and duly sold to James Pleasants, and deed therefor made to said Pleasants, under whom the plaintiff, by sundry conveyances, claims title; that under such title the plaintiff and his grantors paid the taxes on said land for nearly forty years.

2nd. The deed contained in said offer is irrelevant and incompetent evidence against said plaintiff, as the defendant offers no evidence of title in the county commissioners of Columbia county but the tax sale of 1828; that whatever title was acquired at such sale was divested by the tax sale of 1842, and the county had no
31 title in 1882, and the defendant took no title by his deed from the commissioners.

3d. At the sale of 1882 the presumption had become conclusive that the taxes of 1826, 1827, & 1828 had been paid and the land redeemed from the sale of 1828.

Objections sustained, evidence rejected, and bill sealed for the defendant.

M. W. ACHESON. [SEAL.]

Endorsed: C. C. U. S., W. D. Pa. No. 16. June term, 1884. Elisha A. Packer *vs.* Charles G. Murphy. Defendant's offer of evidence No. 2. Plaintiff's objections and ruling of court thereon. Filed September 19th, 1888. B. S. Bentley, clerk.

32 *Copy Defendant's Offer of Evidence No. 3, &c.*

U. S. C. C., Western District of Pa.

ELISHA A. PACKER
vs.
CHARLES G. MURPHY. } No. 16. June T., 1884.

Defendant now offers the treasurer's sale book for 1846, already in evidence, and under the head of sale by the treasurer on the 8th day of June, 1846, the following entries, to wit:

Warrantees or owners.	Acres.	Taxes.	Taxes & costs.	Purchase-money.	To whom sold.	By whom redeemed and when.
Nathaniel Brown...	400	14.81	18.43	18.43	[illegible]	Taxes paid by Jas. Pleasants to C. F. Mann Nov. 19, '47.

And in connection with this renew- *their* offer of the sale by commissioners and deed to defendant in 1882.

The plaintiff makes to the deed made to defendant in 1882 the same objections that were made to the next preceding offer. The entries in the treasurer's sale book were read in evidence to show payment of the taxes on the 19th day of Nov., 1847, by Pleasants, the then owner of the land, as evidenced by the county treasurer. As the entry shows such fact alone, it does not aid the offer of the deed previously rejected by the court.

33 Upon the book there appears on the next line below the entry of "Taxes paid by Jas. Pleasants to C. F. Mann Nov. 19, '47," the following, to wit, "Audited this year, Jan. 4, '48," which, by direction of the court, is added to the offer as part of the entry.

Objections sustained. Evidence rejected and bill sealed for the defendant.

M. W. ACHESON. [SEAL.]

Endorsed: C. C. U. S., W. D. Pa. No. 16. June term, 1884. Elisha A. Packer *vs.* Charles G. Murphy. Defendant's offer of evidence No. 3. Plaintiff's objections and ruling of court thereon. Filed September 19th, 1888. B. S. Bentley, clerk.

34 *Copy Plaintiff's Request to Court to Charge the Jury, &c.*

In Circuit Court U. S., Western District Penna.

PACKER
vs.
MURPHY. } No. 16. June Term, 1884.

The plaintiff respectfully requests the court to charge the jury that under the evidence in the case the plaintiff is entitled to a verdict for the land described in the writ.

Answer. This point is affirmed.

The defendant's counsel excepts to the above answer and charge of the court.

M. W. ACHESON. [SEAL.]

Endorsed: C. C. U. S., W. D. Pa. No. 16. June term, 1884. Elisha A. Packer *vs.* Charles G. Murphy. Plaintiff's request to the court to charge the jury. Answer of court and exception by counsel for defendant. Filed September 19, 1888. B. S. Bentley, clerk.

35 *Copy Defendant's Requests to Court to Charge the Jury.*

In the U. S. Circuit Court for the Western District of Penna.

ELISHA A. PACKER
vs.
CHARLES G. MURPHY. } No. 16. June Term, 1884.

The defendant respectfully prays the court to charge the jury as follows, to wit:

First. That the law does not presume that any one is guilty of fraud or commits a breach of the law; especially does it not presume officers of the law to be so guilty. Therefore a resulting trust in favor of Dr. Thos. Ruston cannot be presumed as to the Nathaniel Brown tract, the land in question, from the mere fact that he paid in certain money upon the application presented by the plaintiff.

Second. A resulting trust could not arise in favor of Dr. Thos. Ruston to the whole of the said land unless he paid the purchase-money in full.

Third. Even if such resulting trust be found in his favor, unless the jury find that it was evidenced by some act of ownership on the part of said Ruston or those claiming under him or some acknowledgement on the part of the warrantee or those claiming under him within twenty-one years after the date of the patent, such resulting trust cannot be made the basis of a claim for recovery by
36 the plaintiff at the present time.

Fourth. That the title to the said tract of land, by whomsoever held in 1828, was divested by the tax sale of that year by the treasurer of Columbia county and vested in the commissioners of the said county.

Fifth. That the title thus vested in the county of Columbia could not be divested by illegal and unwarranted acts on the part of the commissioners. It could only be divested by such redemption as is directed by the law or by such public sale as is directed by law.

Sixth. That if the jury find that the land in question was after the sale in 1842 to James Pleasants again sold to the commissioners by the treasurer on the 8th day of June, 1846, such sale divested any title acquired by said Pleasants at said former treasurer's sale, and the subsequent payment of the taxes for which the land was thus sold in 1846 by said Pleasants would not operate to reinvest him with the title, and therefore the plaintiff cannot recover upon the title claimed under the sale of 1842.

Seventh. That the title to the land in question having become, as aforesaid, vested in the county of Columbia, the
37 subsequent proceedings and conveyances shown by plaintiff could have no effect in the way of transmitting or conveying the title, and the plaintiff has therefore failed to show such title as warrants a recovery in this action.

Endorsed: C. C. U. S., W. D. Pa. No. 16. June term, 1884. Elisha A. Packer *vs.* Charles G. Murphy. Defendant's points to the court. Filed September 19, 1888. B. S. Bentley, clerk.

38 *Copy Plaintiff's Bill of Costs.*

In the Circuit Court of the United States, Western District Penna.

ELISHA A. PACKER
vs.
CHARLES G. MURPHY. } No. 16. June Term, 1884.

Plaintiff's bill of costs for court held at Williamsport 17 Sept., 1888.

J. D. Bodine, witness,	three days.....	4 50
	61 miles' travel	6 10
Charles G. Barkley, witness,	two days.....	3 00
	61 miles' travel	6 10
A. B. Cochran, witness,	three days.....	4 50
	118 miles' travel	11 80
John Casey, witness,	three days.....	4 50
	61 miles' travel	6 10
		$46 60

LYCOMING CO., *Williamsport,* } *ss:*

Elisha A. Packer, being duly sworn, deposes and says that the above witnesses were in attendance and they were necessary, and said bill is correct.

E. A. PACKER.

Sworn and subscribed before me Sept. 19th, 1888.

B. S. BENTLEY, *Clerk.*

39 Endorsed: C. C. U. S., W. D. Pa. No. 16. June term, 1884. Elisha A. Packer *vs.* Charles G. Murphy. Plaintiff's bill of costs at September term, 1888. Filed September 19, 1888. B. S. Bentley, clerk.

40 *Copy of Bond Surwrit of Error.*

Supreme Court of the United States.

ELISHA A. PACKER, a Citizen of the State of New York,
vs.
CHARLES G. MURPHY, a Citizen of the State of Pennsylvania.

Writ of Error to the Circuit Court of the United States, Western District of Penna. No. 16. June Term, 1884.

Know all men by these presents that we, Charles G. Murphy and M. G. Hughes, both of the county of Columbia, State of Pennsylvania, in the district aforesaid, are held and firmly bound unto Elisha A. Packer, of the city and State of New York, in the sum of one thousand dollars, to be paid to the said Elisha A. Packer, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we do hereby bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this twenty-first day of February, A. D. one thousand eight hundred and eighty-nine.

Whereas the above-named Charles G. Murphy hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the
41 circuit court of the United States for the western district of Pennsylvania:

Now, therefore, the consideration of this obligation is such that if the above-named Charles G. Murphy shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to be and remain in full force and virtue.

C. G. MURPHY. [SEAL.]
M. G. HUGHES. [SEAL.]

Sealed and delivered in presence of—
R. S. BENTLEY.

And now, Feb'y 23d, 1889, this bond is approved.
M. W. ACHESON,
U. S. Judge.

Endorsed: U. S. circuit court, west. dist. Pa. No. 16. June term, 1884. Elisha A. Packer, a citizen of the State of New York, *vs.* Charles G. Murphy, a citizen of the State of Pennsylvania. Bond of defendant and M. G. Hughes in $1,000. Filed February 23, 1889. R. S. Bentley, clerk,

42 *Copy Citation Surwrit of Error.*

ELISHA A. PACKER, a Citizen of the State of New York,
vs.
CHARLES G. MURPHY, a Citizen of the State of Pennsylvania.

UNITED STATES OF AMERICA, *ss:*

To Elisha A. Packer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, D. C., on the fourteenth day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Pennsylvania, wherein you, Elisha A. Packer, are defendant in error and Charles G. Murphy is plaintiff in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Marcus W. Acheson, judge of the district court of the United States for the western district of Pennsylvania, this 23d day of February, A. D. one thousand eight hundred and eighty-nine.

M. W. ACHESON,
U. S. Judge, Holding the U. S. Circuit Court.

43 We hereby accept service of the within citation.

JOHN W. & JAMES RYON,
Att'ys for Plaintiffs Below.

March 5th, 1889.

Endorsed: U. S. circuit court, west. dist. Pa. No. 16. June term, 1884. Elisha A. Packer, a citizen of the State of New York, *v.* Charles J. Murphy, a citizen of the State of Pennsylvania. Citation.

44 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Pennsylvania, in the third circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you or some of you, between Elisha A. Packer, a citizen of the State of New York, plaintiff, and Charles G. Murphy, a citizen of the State of Pennsylvania and a resident of the western district thereof, defendant, a manifest error hath happened, to the great damage of the said Charles G. Murphy, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and

full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the
45 United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Williamsport, this twenty-third day of February, in the year of our Lord one thousand eight hundred and eighty-nine, and in the one hundred and thirteenth year of the Independence of the said United States.

[Seal of the U. S. Circuit Court, W. D. Penn.]

B. S. BENTLEY,
Clerk Circuit Court of the United States,
Western District of Pennsylvania.

Endorsed: Charles G. Murphy, plaintiff in error, *vs.* Elisha A. Packer, defendant in error. Writ of error to the circuit court of the United States for the western district of Pennsylvania in No. 16, June term, 1884, of said court.

46 UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *ss:*

I, B. S. Bentley, clerk, do hereby certify that the foregoing is a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, in a certain suit therein lately depending between Elisha A. Packer, a citizen of the State of New York, plaintiff, and Charles G. Murphy, a citizen of the State of Pennsylvania, defendant.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court, at Williamsport, this seventeenth day of October, A. D. 1889, and in the one hundred and fourteenth year of the Independence of the United States.

Seal of the U. S. Circuit Court, W. D. Penn.

B. S. BENTLEY,
Clerk of the Circuit Court of the United States, West. Dist. Penna.

47 In the Supreme Court of the United States.

CHARLES G. MURPHY, Plaintiff in Error,
v.
ELISHA A. PACKER, Defendant in Error. } In Error.

Of October term, in the year of our Lord one thousand eight hundred and eighty-nine.

And now, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Charles G. Murphy, plaintiff in error, by A. Ricketts, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that in the trial of the case in the circuit court for the western district of Pennsylvania the said learned court rejected the offer in evidence by the said Charles G. Murphy, being there defendant, of the patent granted by the State of Pennsylvania to Peter Grahl for the tract of land surveyed to Nathaniel Brown as warrantee, dated 13th of April, 1797, the same being offered to show title out of the Commonwealth; also title out of the plaintiff, and also that the purchase-money was not paid in full for the said tract of land by one Thomas Ruston, as appears by the first bill of exceptions.

48 There is also error in this, that by the record aforesaid it appears that the said learned circuit court also rejected the said defendant's offer in evidence of the sale book of the commissioners of Columbia county, in the said State of Pennsylvania, showing a sale by said commissioners of the said Nathaniel Brown tract of land on the 31st day of August, A. D. 1882, to said C. G. Murphy, to be followed and taken in connection with the deed of conveyance of said commissioners to the said C. G. Murphy in pursuance of said sale of the said tract of land dated 18th September, A. D. 1882, and acknowledged the same day, as appears by the second bill of exceptions.

And there is also error in this, that the said learned circuit court rejected the offer in evidence by the said defendant of the sale book of the treasurer of the said Columbia county for the year 1846, showing under the head of "sale by the treasurer on the 8th day of June, 1846," the following entries, to wit:

Warrantees or owners.	Acres.	Taxes.	Taxes & costs.	Purchase-money.	To whom sold.	By whom redeemed and when.
Nathaniel Brown...	400	14.81	18.43	18.43	Commissioners to	Taxes paid by Jas. Pleasants to C. F. Mann Nov. 19, '47.

49 . The said defendant, in connection with this, renewing his offer of the sale by the commissioners and their deed to him in 1882, as appears by the third bill of exceptions.

And there is also error in this, that, as appears by the record aforesaid, the said learned circuit court affirmed the point presented by the plaintiff in that court, the defendant in error here, the said

point being as follows, to wit: "The plaintiff respectfully requests the court to charge the jury that under the evidence in the case the plaintiff is entitled to a verdict for the land described in the writ." And the answer thereto was, "This point is affirmed."

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Charles G. Murphy, whereas by the law of the land the said judgment ought to have been given for the said Charles G. Murphy against the said Elisha A. Packer; and the said Charles G. Murphy, plaintiff in error, prays that the judgment aforesaid may be reversed annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment, etc.

A. RICKETTS,
Attorney for Plaintiff in Error.

Endorsed on cover: Case No. 14,040. W. Pennsylvania C. C. U. S. No. 107. Charles G. Murphy, plaintiff in error, *vs.* Elisha A. Packer. Filed May 19, 1890.

DEC 28
JAMES H. McKENNEY,
CLERK

BRIEF OF PLAINTIFF IN ERROR.

CASE NO. 14,040.

IN THE

Supreme Court of the United States.

October Term, 1893.

Term No. 107.

CHARLES G. MURPHY, Plaintiff in Error,

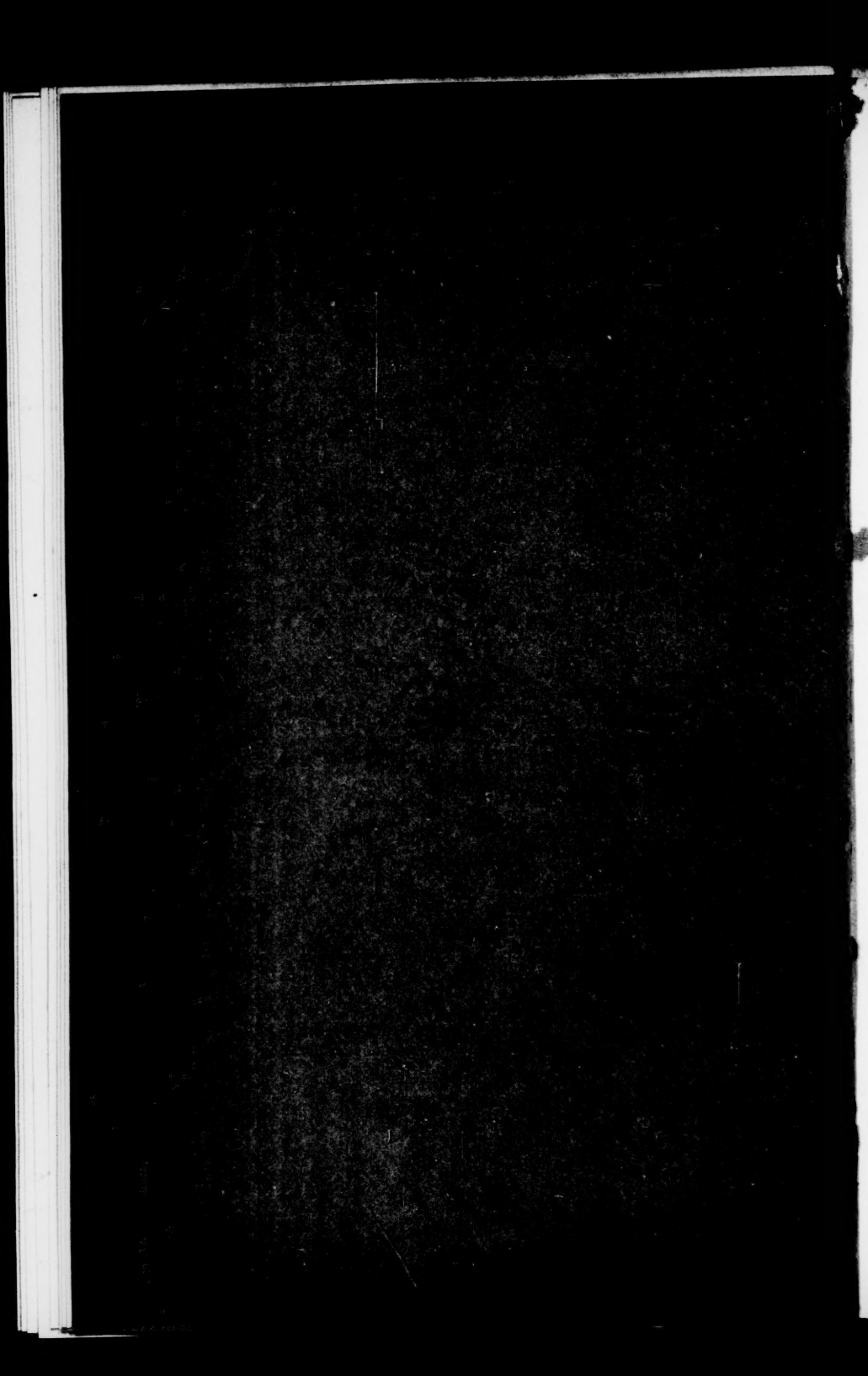
vs.

ELISHA A. PACKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

A. RICKETTS,
Counsel for Plaintiff in Error.

W. H. Hibbs, Printer, Wilkes-Barre, Pa.



CASE NO. 14,040.

IN THE

Supreme Court of the United States.

October Term, 1893.

Term No. 107.

CHARLES G. MURPHY, *Plaintiff in Error,*

vs.

ELISHA A. PACKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

STATEMENT OF THE CASE.

In the State of Pennsylvania, by statute of 3d April, 1804, and its several supplements, a system for the assessment and collection of taxes on unseated lands "held by individuals, companies or bodies corporate," was provided. These statutes will be found in Purdon's Digest, Vol. 2, pp. 1671–1684. To enforce payment, the Treasurers of the several counties were authorized and directed to make sales of such lands situate in the proper county, when the taxes assessed thereon remained due and unpaid for the space of one year before the time of sale. And

upon such sale the Treasurer was also authorized and directed to make a deed for the land in fee simple to the purchaser. In case no purchaser appeared to bid the amount of taxes and costs, then it was made the duty of the County Commissioners to bid off the land and take the Treasurer's deed to and for the use of the proper county. While the land remained the property of the county it was not to be charged with taxes in the duplicate of the collector of taxes.

When the land was sold to a purchaser other than the Commissioners, the owner of the land had a right during two years from the day of sale to redcem the land upon payment of the amount of taxes for which the land was sold, and the costs, and twenty-five per cent. additional on the same; and the Treasurer was required to receive and receipt for the same.

When the land was sold to the Commissioners, the right of redemption remained in the owner for five years after such sale, during which time it was the duty of the Commissioners to charge the taxes against such land in their office; and upon the payment by the owner, of the taxes and costs due at the time of the sale, and interest thereon, and also the taxes assessed thereon as aforesaid from year to year, and interest upon each assessment, then the Commissianers were required to convey the right and title of the county to such owner by deed-poll indorsed upon the back of the Treasurer's deed to them. In case no such redemption were made, then the Commissioners were authorized to sell the land at public sale and convey the same to the purchaser.

In the portion of the State where the land, the subject of the present controversy lies, the manner of acquiring land from the State, was by a warrant from the land office to the proper surveyor, to survey and return for the applicant the land desired. The applicant was named the warrantee, and the tracts are generally designated by the

name of the warrantee. And upon the return of survey, and payment of purchase money and fees, a patent was granted to the warrantee or his vendee. The present action is an ejectment for a tract of land situate in Columbia county in said State, in the warrantee name of Nathaniel Brown. On the 26th of November, 1793, a warrant was granted to said Nathaniel Brown, for the said tract of four hundred acres. It was one of six warrants granted the same day. On 14th June, 1794, there appears to have been paid through a certain Dr. Ruston upon six warrants sixty pounds on purchase money, and sixty shillings on fees, leaving a remaining charge of one hundred and sixty-eight dollars. On the 21st of October, 1794, the survey to Nathaniel Brown was returned, and on the 13th April, 1797, a patent for the same tract was granted to one Peter Grahl reciting a conveyance to him from Nathaniel Brown, and also the payment by him of the balance due the Commonwealth.

This tract was duly assessed with taxes as unseated land, for the years 1826 and 1827, and these taxes remaining unpaid, it was sold by the Treasurer to the Commissioners of Columbia county on the second Monday of June, 1828. It was never redeemed, and all title to the tract thus became vested in the County of Columbia. The Commissioners never made public sale of the same until the 31st of August, 1882, when they made such sale to Charles G. Murphy, the plaintiff in Error, and on the 18th September, 1882, regularly executed and delivered their deed for the tract to him.

Certain parties claiming title to the tract, by virtue of mesne conveyances from the patentee Peter Grahl to themselves, took possession of the land. Thereupon the said C. G. Murphy brought an action of ejectment against them in the Common Pleas of said Columbia county. The case was entitled Charles G. Murphy *vs.* Jane Herron and Charles D. Herron her husband, *et al.*, and the sum-

mons issued the 2d of January, 1883. The question in the case was the validity of the said tax title and upon the trial in the Common Pleas the Court declared it a valid title, entitling the plaintiff to recover, and directed a verdict for the plaintiff. A writ of error from the Supreme Court of the State was purchased, judgment having been entered on this verdict, and upon full hearing the said Supreme Court affirmed the judgment. Thus the validity of this tax title was judicially settled in the Courts of the State. The case is reported in the *22d Weekly Notes of Cases, at pp. 181–3, Herron et al., vs. Murphy.*

The present action of ejectment was brought against said Charles G. Murphy in the Circuit Court of the United States for the Western District of Pennsylvania, by Elisha A. Packer, a citizen of the State of New York, claiming title by virtue of sundry mesne conveyances from Dr. Ruston to himself, and claiming that it appearing that the purchase money for the land was paid into the land office by Dr. Ruston, it must be presumed it was thus paid for his own use, and that a resulting or constructive trust arose in his favor. The defendant Murphy claimed that it was immaterial whether Nathaniel Brown, or Peter Grahl, or Dr. Ruston, was the real owner of the land, because whoever was the owner, the title to the land had been devested by the sale for taxes, and by the Commissioners' sale had been vested in him. He also claimed that from the records, documents and facts, just the contrary presumption arose to that claimed by the said plaintiff. And also that even though there had been a resulting trust originally, it could not now be asserted against him, being barred by the Statutes of limitation. The Circuit Court ruled against the defendant upon all these points, ignored the decision of the Courts of the State aforesaid, and refused to permit him to put in evidence the Patent from the Commonwealth, and also

rejected the evidence of the sale by Commissioners and their deed to him. These refusals are the subjects of the first and second bills of exception.

The plaintiff Packer, put in evidence a sale for taxes of this same tract in 1842, by the Treasurer, to one James Pleasants. The defendant Murphy then proposed to show by the same record a subsequent sale in 1846 of the same tract to the Commissioners again; this was also refused, and forms the subject of the third bill of exceptions.

Finally the said Circuit Court directed the jury to find a verdict for the plaintiff there for the said tract of land; which is the subject of the fourth bill of exceptions. Judgment having been entered on said verdict, the present writ of error from this Court was purchased.

SPECIFICATION OF ERRORS.

It is respectfully submitted that the learned Circuit Court for the Western District of Pennsylvania erred in the following particulars, to wit:

1. In refusing the offer in evidence by Charles G. Murphy the plaintiff in error, being there defendant, of the Patent granted by the State of Pennsylvania to Peter Grahl for the tract of land surveyed to Nathaniel Brown as warrantee, dated 13th of April, 1797; the same being offered to show title out of the Commonwealth; also title out of the plaintiff; and also that the purchase money was not paid in full by Thomas Ruston; as appears by the first bill of exceptions of the said defendant; see Record, page 13. A copy of the Patent to Peter Grahl is printed at page 1 of Appendix to this brief.

2. In rejecting the said defendant's offer in evidence of the sale book of the Commissioners of Columbia county, in the said State of Pennsylvania, showing a sale by said Commissioners of the Nathaniel Brown tract of land on the 31st day of August, A. D. 1882, to said C. G. Murphy, to be followed and taken in connection with the deed of conveyance of said Commissioners to the said C. G. Murphy in pursuance of said sale of the said tract of land dated 18th September, A. D. 1882, and acknowledged the same day; as appears by the second bill of exceptions of said defendant; see Record, page 14.

3. In rejecting the offer in evidence by the said defendant of the sale book of the Treasurer of the said Columbia county for the year 1846, showing under the head of "sale by the Treasurer on the 8th day of June, 1846," the following entries, to wit:

Warrantees or owners.	Acres	Taxes	Taxes & costs	Purchase Money	To whom sold	By whom redeemed and when.
Nathaniel Brown	400	14.81	18.43	18.43	~~Commissioners~~	Taxes paid by James Pleasants to C. F. Mann Nov. 19, '47

The said defendant, in connection with this, renewing his offer of the sale by the Commissioners and their deed to him in 1882; as appears by the third bill of exceptions of said defendant; see Record, page 15.

4. In that the said learned Circuit Court affirmed the point presented by the plaintiff in that court, the defendant in error here, the said point being as follows, to wit: "The plaintiff respectfully requests the Court to charge the jury that under the evidence in the case the plaintiff is entitled to a verdict for the land described in the writ." And the answer thereto was, "This point is

affirmed." As appears by the exception of said defendant; see Record, pp. 15 and 16.

5. And also in that by the record aforesaid it appears that the judgment aforesaid given was given for the said Elisha A. Packer against the said Charles G. Murphy, whereas by the law of the land the said judgment ought to have been given for the said Charles G. Murphy against the said Elisha A. Packer. And the said Charles G. Murphy, plaintiff in error, prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment.

BRIEF OF THE ARGUMENT.

First Assignment of Error.

It was not disputed in the Circuit Court, that a regular assessment of taxes for the years 1826 and 1827, was made upon the land in question, and that a sale of the land to the Commissioners was regularly made by the Treasurer in 1828, and his deed duly executed and delivered to the said Commissioners.

This sale unquestionably passed the title to the land to the county, and effectually put an end to any and all claims of title under any former owner. The Act of Assembly of 13 March, 1815, Purdon's Digest, page 1674, pl. 17, authorizing sales of unseated lands for taxes by the county treasurers, in its first section provides as follows:

"The Treasurers of the several counties in this Commonwealth shall be and they are hereby respectively au-

thorized and directed to commence, on the second Monday in June, in the year 1816, and at the expiration of every two years thereafter, and adjourn from day to day if it shall be found necessary so to do, and make public sale of the whole or any part of such tracts of unseated lands, situate in the proper county, as will pay the arrearages of the taxes, any part of which shall then have remained due and unpaid for the space of one year before, together with all costs necessarily accruing by reason of such delinquency, and to make and execute a deed or deeds, in fee simple, in the manner directed by the Act to which this is a further supplement."

The 5th Section of the Act of 3 April, 1804, declares the effect of such sales, as follows:

"Sales of unseated lands for taxes that are now due, or that may hereafter become due thereon, made agreeably to the directions of this act, shall be, in law and equity, valid and effectual, to all intents and purposes, to vest in the purchaser or purchasers of lands sold as aforesaid, all the estate and interest therein, that the real owner or owners thereof had at the time of such sale, although the land may not have been taxed or sold in the name of the real owner thereof."

NOTE.—In Purd. Dig., p. 1677, pl. 30, this is incorrectly printed as the 5th Section of the Act of 8th April, 1851.

"When unseated land is sold for the payment of taxes, "the title of the real owner, whatever it may be, passes "to the purchaser, whether it be assessed and sold in his "name, the name of the warrantee, or a stranger, and "whether the person in whose name it is taxed and sold "has or has not any title."

Strauch vs. Shoemaker, 1 W. & S., 166.

Russel vs. Werntz, 24 Pa. St. R., 337.

So completely does the title pass that the purchaser takes the land clear of incumbrances.

Fager vs. Campbell, 1 Watts, 287.
Hockenbury vs. Carlisle, 5 W. & S., 348, 350.
Irwin vs. Trego, 22 Pa. St. R., 368, 374.

There having never been any redemption of the land, the title to the tract became absolute in the county, and there remained no title in any individual prior to that sale under which any one could thereafter claim. Title to this tract must thenceforth be derived from the County of Columbia. It is therefore self-evident, that if Dr. Ruston ever had any title, prior to 1828, that title had been transferred to the county by the said Treasurer's sale that year, and the plaintiff in the Circuit Court could not set up any valid claim under Dr. Ruston, or any one else, as prior to the date of the Patent.

Moreover, even if Dr. Ruston had had title as claimed by the said plaintiff, such title had been completely barred by the statutes of limitation in force in Pennsylvania, long before the time of the trial in the Circuit Court, as we will show more fully under another head.

Nor was the defendant in the Circuit Court, plaintiff in Error here, a stranger to the patentee, and to any claim of title under the patent, as was objected in the Circuit Court. His title was directly in the line of the patent. It was a material and integrant part of his title to show that the title was out of the Commonwealth, for it was only lands "held by individuals, companies or bodies corporate," that could be assessed and sold. And the patent was the proper instrument of evidence to show the fact. The fourth section of the Act of 11th March, 1843, Purd. Dig. p. 1053, pl. 149, is, "It is hereby de-"clared, that all patents granted by the Commonwealth, "do pass and vest the entire estate of the Commonwealth "to and in the patentees, free and clear of all liens, in-

"cumbrances and claims of the Commonwealth whatso-
"ever, prior to the date of the respective patents, except
"for arrears of purchase money."

Again, the claim of the plaintiff in the Circuit Court, was wholly based upon an alleged resulting trust, arising from the fact that the purchase money for the Nathaniel Brown warrant was paid by Dr. Thomas Ruston. And his whole evidence of such payment was the memorandum upon what is known in Pennsylvania as John Keble's blotter, of a payment by said Ruston upon the purchase money and fees for six warrants, in which the Nathaniel Brown warrant appears to be included. John Keble was chief clerk in the Receiver General's office, and his blotter was one of the documents or papers in that office, and was made evidence by the Act of Assembly of 31st March, 1823, which was as follows, to wit:

"That copies of all records, documents and papers, in the offices of the Secretary of the Commonwealth, Secretary of the Land Office, Surveyor General, Auditor General, and State Treasurer, when duly certified by the officers of said offices respectively, shall be received in evidence in the several courts of this Commonwealth, in all cases where the original records, documents and papers would be admitted in evidence: *Provided, however*, That in any judicial controversy, before any Court of this Commonwealth, either party may have the original record, document or papers produced on the service of the proper process for that purpose."

Keble's blotter was included within this Act, because the office of Receiver General had been abolished, and the books, papers and documents in his office relating to the titles to lands, transferred to the office of the Secreta-

ry of the Land Office, by an Act of Assembly of 29th March, 1809.

If Keble's blotter, a mere document in the said office, was legitimate evidence upon the question of payment of the purchase money, under this Act, why was not the patent, a record in the said office, likewise evidence upon the same question? Is it not the very acme of inconsistency, to say that the mere entry of a clerk is evidence, but the solemn official acknowledgment of the officials is not? It is to be observed, that the entry in Keble's blotter expressly states that there remained unpaid a portion of the purchase money and fees. The patent in its acknowledgment of the payment of the consideration, says the same thing, and states that balance to have been paid by the patentee.

And this was material and relevant. For the plaintiff claiming that there was a resulting trust in favor of Dr. Ruston, it was a material question whether he had paid the full purchase money. If he had not, but had only paid a part, no such trust arose.

Olcott vs. Bynum, 17 Wall., 44.

All the cases which declare a resulting trust such as here claimed, rest upon the fact of the full payment of the purchase money, not merely a part of it. We shall endeavor to show under another head, that not only for this but for other reasons, the plaintiff in the Circuit Court could not set up a resulting trust in Dr. Ruston or any one claiming under him. For the present, we call attention to the fact, that there is an inaccuracy in speaking of the claim of title in Dr. Ruston as being a prior title to that conveyed in the patent. The claim made is, that the patentee was a trustee for Dr. Ruston because Dr. Ruston paid the money for *that title* which was conveyed to the patentee. It was not another and prior title, but the very same title; the Ruston claim being simply

an equity claimed as binding upon the holder of *that* legal title.

We do not mean to contend against the ruling in Pennsylvania that a title by warrant and survey is in many cases held to be equivalent to the legal title. But we do mean to say that Dr. Ruston did not hold the warrant and survey in this case; and the utmost that could be claimed for him was that the warrantee was a trustee for him; and that when the title of the warrantee was completed by a patent, the trust still was attached to the title.

The failure to observe the distinction between legal and equitable titles, has caused some confusion in the Pennsylvania decisions. For instance, in *Gingrich vs. Foltz, 19 Pa. St. R., 38, 40,* the Court speaks of the warrant, survey, and payment of the purchase money, as constituting the *legal title;* and of the patent bearing on its face "the evidence that the land had been previously sold to another (the warrantee.)" While in *The Del. & Hud. Canal Co. vs. Dimock, 47 Pa. St. R., 393, 397,* the Court says, "The warrant confers, indeed, but an incep-"tive or equitable title, but it is the title that is paid for, "and the patent which passes the legal title out of the "Commonwealth is so merely a perfection and confirma-"tion of the title by warrant, that if a wrong party re-"ceives the patent, he is always treated as holding in "trust for the warrantee or the true party under him." Thus according to this last case the *legal title* remains in the Commonwealth although a complete equitable title has passed to the warrantee upon payment for the title; and according to *Gingrich vs. Foltz,* when the title has been paid for by the warrantee that constitutes the *legal title;* consequently, if this be correct, there may be two *legal titles* to the same land, at the same time, in the hands of different parties, in Pennsylvania.

It is also not unprofitable to observe the decisions in the leading cases wherein the recitals in patents are held

to be inadmissible. In *Penrose vs. Griffith, 4 Binn., 231*, where the defendant claimed under an improvement begun in 1761, followed by a warrant and patent, and the plaintiff claimed under a warrant granted 30th May, 1763, followed by patent. It was ruled that in the plaintiff's patent the recitals of the conveyances from the warrantee to the patentee were not evidence against the defendant claiming by a title originating in 1761, two years before the warrant was granted under which plaintiff claimed. And, even in that case, one of the three judges composing the Court dissented from the ruling of the other two.

In *Downing vs. Gallagher, 2 Ser. & R., 455*, we have the Court's own exegesis of this decision in *Penrose vs. Griffith*, wherein they say the expressions in it are to be applied to the case then before the Court. And they also say, "the patent shews, that the Commonwealth granted all "its right to the persons under whom the plaintiff claims. "For that purpose at least it is evidence. Whether the "recital shall affect the defendant is a different question "and will depend upon the time at which his title under "the Commonwealth commenced."

And in view of the objection made that the defendant in the Circuit Court was a stranger to the title under the patent, it is worth while to note the following language in this case, to wit: "But in the case of a patent who can "be considered a stranger? Every person in possession "of land, and claiming it, must be considered as holding "either mediately or immediately from the Common- "wealth."

We think the most thorough investigation of all the decisions upon this question, will reach the result, that the patent is always admissible in evidence, but its operation will be controlled so that the recitals of mesne conveyances from the warrantee to the patentee will not amount to proof of such conveyances against one claim-

ing by a prior right; and in case of any fraud or wrongdoing in the obtaining it, that the patent shall not operate to the benefit of the wrongdoer, nor to the disadvantage of the party wronged.

In the present case, Dr. Ruston by his own procedure in the land office, declared that the portion of the purchase money paid by him, was paid for Nathaniel Brown. And the action of the officials in accepting the balance from the patentee and granting him the patent was in simple accordance with the title as thus arranged by Dr. Ruston himself.

We submit that the patent was clearly admissible to show that the Commonwealth had granted the title to the patentee; also, that it was a proper instrument of evidence to show that the whole purchase money was not paid by Dr. Ruston; and thus to show that the title was not in plaintiff.

We therefore submit, that the learned Circuit Court fell into clear error, in rejecting the evidence thus offered.

SECOND ASSIGNMENT.

In view of the decision of the Court of Columbia county, and its affirmance by the Supreme Court of the State, as reported in *22d Weekly Notes of Cases, pp. 181–3, Herron et al., vs. Murphy*, expressly ruling the very questions raised in the defendant's second bill of exceptions, in favor of the defendant, the present plaintiff in Error, it is difficult to understand the ruling of the learned Circuit Court, as set forth in said bill. The 5th, 6th and 7th sections of the Act of 13th March, 1815, authorizing the sale to the Commissioners and prescribing and directing their powers and duties in reference to the holding and disposing of the lands so sold to them, Purd. Dig. pp. 1682–3, pl. 52–4, are as follows:

"If any tract of unseated land, hereafter to be sold for taxes, due at this time, or which shall hereafter be imposed, shall not have bidden for it a sum equal to the whole amount of taxes for which it shall have been advertised and the costs accrued, then and in that case, it shall be the duty of the Commissioners of the proper county, or any of them, to bid off the same, and a deed shall thereupon be made by the Treasurer to the Commissioners for the time being, and to their successors in office, to and for the use of the proper county; and it shall be the duty of the Commissioners to provide a book, wherein shall be entered the name of the person as whose estate the same shall have been sold, the quantity of land, and the amount of taxes it was sold for, and every such tract of land shall not thereafter, so long as the same shall remain the property of the county, be charged in the duplicate of the proper collector; but for five years next following such sale, if it shall so long remain unredeemed, the Commissioners shall, in separate columns of the same book, charge every such tract of land with reasonable county and road tax, according to the quality of the said land, not exceeding in any case the sum of six dollars for every hundred acres.

"The right of redemption shall remain in the real owner of such land for five years after such sale, and on paying the Treasurer of the county all the taxes and costs due thereon at the time of sale, and interest therefor for the same time, and also the taxes which shall have been assessed thereon from year to year after the sale, and interest of each assessment, to be counted from the time it ought to have been paid, and on the production of the Treasurer's receipt, the Commissioners shall by deed-poll, indorsed on the back of the Treasurer's deed to them, convey to the person who shall have been the owner of the land at the time of sale, or his legal representative, all the right and title the county may have acquired un-

der such sale as aforesaid; the money so received for road taxes shall be paid to the supervisors of the roads of the township within which such lands shall lie, on orders to be drawn by the Commissioners on the Treasurer, to be applied by them to making and repairing the roads and highways in their respective townships.

"If the owner of any such land shall not redeem the same within the period aforesaid, it shall thereafter be lawful for the Commissioners to sell any such land, by public sale, and make a deed therefor to the purchaser, which shall be available in law, as well against the county as against the person or persons as whose estate the same has been sold."

The principal question in *Herron vs. Murphy* above cited, was upon the construction of these provisions of the statute; and in that case the same contention was made as in the objections to this offer of evidence, and the ruling of the State Courts was in favor of the validity of this sale by the Commissioners.

As will be seen, the powers and duties of the County Commissioners, with regard to lands sold to them by the Treasurer, were by these provisions of the Act, expressly defined and limited. They could not charge the lands while in their hands, with taxes in the duplicate of the collector. They were required to yearly, for five years after such sale, charge the land with proper taxes in a book to be kept in their own office, to show the amount necessary to be paid by the owner in case he chose to redeem. The right to redeem remained in the owner for five years after the sale, and in case he paid the taxes and costs due at time of sale, and interest thereon, and also the taxes thus yearly assessed in the Commissioners' office, and interest on each assessment, they were then to convey to him by deed-poll, indorsed on the back of the Treasurer's deed to them, the title of the county. They

could only make such conveyance to the owner. They could not make a private sale to any other than the owner of the land. The only way they were empowed to dispose of the land in case the owner did not redeem, was by public sale,—which subsequent Acts required to be fully advertised.

Beside the case of *Herron vs. Murphy*, there are other decisions to the same effect. In *Jenks vs. Wright, 61 Pa. St. R., 410*, it was decided that until the county has parted with its title to the land, by the performance of the pre-requisites to a sale, to others than the original owners, the title remains in the county. Also that the precise statutory direction is an element in the power of the Commissioners to sell, which if wanting, "must neces-"sarily render a sale, without the observance of these pre-"requisites, void."

In *Russel vs. Werntz, 24 Pa. St. R., 337*, where, whilst the title to unseated land was in the county, under a purchase by the Commissioners at Treasurer's sale, and persons claiming separate interests in the land, had their separate interests assessed, and paid the taxes; and the land was afterwards sold at public sale by the Commissioners; it was ruled by the Court below that such assessment and payment of taxes was not to be considered as a disclaimer by the Commissioners of the title acquired by them at the Treasurer's sale. And this was affirmed by the Supreme Court; that Court saying, "There is "nothing in the seventh error. Whilst the title was in "the county it could not be prejudiced by the payment "of taxes other than those for which it had been sold. If "the county taxed lands the title of which was in itself, "and parties paid the taxes in ignorance of the fact, they "may, perhaps, have an equitable right to reclaim their "money; but they cannot invalidate that title in the

"hands of a *bona fide* purchaser from the county." And as will be seen by reference to argument of counsel, page 344, this was in answer to a claim that the land being assessed while the county held it, and the taxes being paid, the Commissioners must be considered as relinquishing all claim to it, and that they had no right to sell it.

In *Goodman vs. Sanger, 85 Pa. St. R., 37, 41,* in which case the land was held by the county for a longer time than in the present case, the Court says, "And first it must be "remembered that after the lapse of five years from the "tax sale, the title of the county became absolute, and "nothing but a redemption by the permission of the "Commissioners could adeem the title of the county."

Of course this language refers to what is known as *permissive* redemption, a privilege which is allowed to owners even after the five years during which their right to redeem is absolute; a privilege which cannot, however, be permitted to any one except an owner.

In *Barton vs. Smith, 1 R., 403,* it was ruled that the acts of officers of the land office, outside of the authority conferred by the law, are void. In that case there had been surveys before the warrants came to the hands of the deputy surveyor; the surveys had been accepted in the Surveyor-General's office, and the purchase money paid. And it was claimed, that the surveys were not absolutely void, and that the acceptance of the surveys, and of the purchase money, were an affirmance by the Commonwealth of the transaction; and the practice under the Penn proprietaries was cited. But the Court, after pointing out the distinction and the difference between the situations under the proprietaries and under the Commonwealth, says, (see p. 407), "The officers of the land "office, under the State government, are as much bound

"by the Acts of Assembly, as any other citizens. They "derive their authority from the law, which they may "construe but cannot alter. A uniform practice of the "land office is a strong evidence of the law, to which the "courts have always paid a great respect, particularly "where a difference in construction, where there is room "for it, would unsettle estates; but that they can disre-"gard the plain injunction of an Act of Assembly, is "what cannot be permitted. It is contrary to the theory "of our government, that they should have a dispensing "power, and in this consists the difference in the usages "of the present and the proprietary government. The "Court are, therefore, of the opinion, that the survey be-"ing made without authority, is void; and, that the re-"ceipt of the purchase money, and the acceptance of the "survey, do not render valid the title of the plaintiff."

And this decision has ever since been recognized as the true expression of the law.

Fox vs. Lyon, 27 Pa. St. R., 9, 16.

Manhattan Coal Co. vs. Green, 73 Pa. St. R., 310, 320.

These rulings of the Pennsylvania Supreme Court, as to the requisites of a valid sale for taxes, and as to the powers of officers, are in direct accord with the decisions of this Court, ruling, that the execution by a public officer of a power to sell lands for the non-payment of taxes, must be in strict pursuance of the law under which it is made, or no title is conveyed; and that the party who sets up title under such sale, must furnish the evidence that every pre-requisite to the exercise of the power to sell has preceded the sale.

Williams et al. vs. Peyton's Lessee, 4 Wheat., 77.

Thatcher et al., vs. Powell et al., Lessees, 6 Wheat., 119.

Mason et al., vs. Fearson, 9 How., 248, 260.

Moore vs. Brown et al., 11 How., 414.

Early vs. Doe ex dem. Homans, 16 How., 610.

Holroyd vs. Pumphrey, 18 How., 69.
Ransom vs. Williams, 69 U. S., 313.

And they are likewise in accord with the rulings upon this subject throughout the United States, as will be seen by reference to *Blackwell on Tax Titles, and the cases cited in the notes, at pp. 33–5, 49–56, 60–4, of the 4th Edition.*

Examining the Treasurer's sale of 1842 to James Pleasants, set up by the plaintiff in the Circuit Court, in the light of these decisions and principles, it very clearly appears wholly invalid. The said plaintiff did not show that the pre-requisites to the exercise of the power to sell by the Treasurer preceded the sale. On the contrary, the evidence in the case did show that one of the most material pre-requisites did not precede it. Without a tax duly assessed upon the land by the proper officers, the Treasurer had no authority whatever to sell the land. And the land held by the county was not such land as the law authorized to be assessed. The second section of the *Act of 3d April, 1804, Purd. Dig., 1671, par. 1,* which defines what lands may be assessed, is as follows, to wit: "All unseated lands within this Commonwealth, held by "individuals, companies or bodies corporate, either by "improvement, warrant, patent or otherwise, shall for "the purpose of raising county rates and levies, be val- "ued and assessed in the same manner as other property."

Thus from the letter as well as the spirit of the Act authorizing the taxing and sale of unseated lands, it clearly appears that there was no authority to tax and sell lands held by the county itself. And that the assessments for the years 1838, 1839, 1840 and 1841, were simply void assessments, because the Commissioners had no power to make such assessments. And therefore the Treasurer had no authority to make the sale in 1842, be-

cause one of the essential pre-requisites to such authority was the fact that a tax had been duly assessed, and remained due and unpaid for the space of one year before the sale.

Laird vs. Hiester, 24 Pa. St. R., 452.
McReynolds vs. Longenberger, 57 Pa. St. R., 13.
Breisch vs. Coxe, 81 Pa. St. R., 336, 348.
Miller vs. McCullough, 104 Pa. St. R., 624.

Moreover, the statutes not only gave no power to make such assessments, but expressly prohibited the making such assessments, as will be seen by reference to the sections of the statutes quoted on page 15 of this brief. To permit the claim that the sale by the Treasurer in 1842 was a valid sale and conferred any title, would be to permit a party to claim under a statute, without bringing his claim within the terms of the statute; and not only this, but to permit him to claim in direct violation of the terms of the statute under which he claims. The law is very certainly directly to the contrary. In *Campbell vs. Galbreath, 1 Watts, 70*, at page 93, the Court, speaking of the rule applicable to a party claiming under a statute, says, "the rule is, that when a right is given by statute "he who claims that right must bring his case within "the terms of the statute. What is required by the law "to be done, must be done, or no right attaches. And "this rule is admitted and supported to its full extent by "the Supreme Court of the United States, in *Wilson vs.* "*Mason, 1 Cranch, 45, 97, 98*, as applied to grants of land "under the laws of Virginia; and in that case a man who "had paid his money, and got his survey returned before "any adverse claim, but who, instead of performing what "was required by the Act, had substituted what he "thought was equivalent, was declared to have no title "in law or equity; and the owner of a subsequent office "title, and who had full notice of all that had been done

"by his opponent, held the land; and in that case it was "not imagined that any act of the State claiming the for- "feiture was necessary."

See also, *East Union Township vs. Ryan, 86 Pa. St. R., 459; Viner's Ab., Vol. 19, p. 506, tit. Statutes, par. 25; 9 Bac. Ab., 261, tit. Statutes*, stating, "Where the power to "do an act was originally granted by a statute, it must "be shown in pleading the statute that the act was done "according to the direction of that statute, and of every "subsequent statute relative to the subject."

We submit that the above cited decisions of the Pennsylvania Supreme Court, construing the statutes of that State in relation to the assessment and sale of lands for taxes, were conclusive upon the Circuit Court; and especially the case of *Herron vs. Murphy* expressly deciding the very case before the Court; and that the Circuit Court erred in disregarding these decisions of the highest Court in the State, and setting up a different rule of property from that thus established by the State Court. It was to avoid just such a situation, that this Court overruled two of its own decisions in *Green vs. The Lessee of Neal, 6 Pet., 291*, the State Court having subsequently to them adopted a construction of a State statute different from that which was understood to be the law of the State at the time the said decisions were made. The Court saying at p. 300, "Here is a judicial conflict, arising "from two rules of property in the same State, and the "consequences are not only deeply injurious to the citi- "zens of the State, but calculated to engender the most "lasting discontents. It is therefore essential to the in- "terests of the country, and to the harmony of the judi- "cial action of the Federal and State governments, that "there should be but one rule of property in a State."

That in a controversy respecting title to lands in a State, this Court will administer the law of the State in all respects as if it were a Court sitting there and reviewing the decision of an inferior Court in that State; and that a title to lands can only be acquired and lost according to the laws of the State in which they are situate; and that the construction of the statutes of a State relating to lands, by the highest State Court, is a rule of property in that State, and as binding upon the United States Courts as though a part of the statute; are all propositions which we understand to have passed into settled law. We cite a portion of the decisions of this Court thereupon, to wit:

Clark et al., vs. Graham, 6 Wheat., 577.
Elmendorf vs. Taylor et al., 10 Wheat., 152, 159–60.
Lloyd vs. Fulton, 91 U. S., 479.
Lippincott vs. Mitchell, 94 U. S., 767.
Slaughter vs. Glenn, 98 U. S., 242.

There is one Pennsylvania decision that favors the claim of the defendant in error, to wit, *Diamond Coal Co. vs. Fisher, 19 Pa. St. R., 267.* But this decision is not only at variance with the due course of the law as set forth in the decisions which we have above cited, but bears in itself and upon its own face, its own refutation. In that case the land had been sold by the Treasurer to the Commissioners in 1820. Within the five years whilst the absolute right of redemption was an existing right in the original owner, and when as we have above mentioned, there was not only no power at all to assess and sell the land, but such assessment and sale was expressly forbidden by the law, the land was again assessed and a sale made by the Treasurer in 1824. This decision, instead of treating this assessment and sale as simply void as the decisions we have cited, and as all sound law, declare, treated the same as a mere irregularity.

Again, though admitting that the sale was void as against the orignal owner at the time it was made, yet it held that it became good when such owner did not redeem until after the five years had passed; thus overlooking wholly the principle expressed in the maxim *Quod ab initio non valet in tractu temporis non convalescit.*

Apposite illustrations showing the unsoundness of this decision, will be found in Broom's Legal Maxims under the head of this maxim.

Again, the decision is based upon what is called "pure and self-evident morality," to wit, that when a man sells land which he does not own and afterwards acquires the title, such title enures to the benefit of his vendee; and when a man misleads another into the purchase of property, which he himself owns, he shall not use his own title to the injury of the person whom he has thus misled. These are undoubtedly sound and proper principles, and eminently proper wherever they properly apply. But obviously they were not applied in their proper place in this decision. As to the first, the subsequently acquired title enuring to the benefit of a former grantee, the learned Judge cited *Rawle on Covenants for Title.* But it is evident, he did not carefully examine the matter, or he would have observed it plainly set forth in the work he thus cited, that that principle did not apply in conveyances without covenants for title, or that which was their equivalent. *Rawle on Cov., 385–9, 4th Ed.* And that, therefore, it did not apply to such conveyances as the Treasurer's deed upon a tax sale, in which there are no covenants whatever.

See also, *Kennedy vs. Skeer, 3 Watts, 95.*

And he would also have noted that the after-acquired estate must be held by the grantee in the same right as that in which his former conveyance was made.

Rawle on Cov., 399, 4th Ed.

And further, that this doctrine had been adopted, not because of its morality, but upon the principle of preventing circuity of action, and arose from the interpretation put upon section 446 of Littleton, and Coke's Commentary upon it.

Secondly, as to the doctrine of innocent purchasers, misled by a fraudulent grantor, it was equally out of place in this decision. The powers and duties of the Commissioners and the Treasurer; the authority to assess the lands with taxes, and the authority to make sale of the lands for non-payment of the taxes, are all expressly prescribed and defined by the public statutes of the State. And the purchaser at a tax sale is bound to inquire whether the power is being duly exercised, it being a naked, statutory, special authority, depending upon the letter of the law for its support.

In *Moore vs. Brown et al., 11 How., 414*, where the officer had made sale of land for taxes at least six days before the law authorized him to sell, and it was declared that the sale and deed were therefore void, the Court, at page 425 adds, "It was not, then, a sale according to law. "That must have been as well known by the purchaser "as it was by the auditor. The law presumes it to have "been. The Act under which the sale was made was not "meant to prescribe the authority of the auditor only to "make sales, but also to give to purchasers full informa- "tion of the terms upon which a title could be acquired "to lands sold for the non-payment of taxes. It was meant "to put bidders at a tax sale upon the inquiry, whether "or not the land was offered for sale according to law. If "they do not examine and shall buy land exposed to sale "for taxes against the law, they do so at their own risk, "and it will be presumed against them that they know

"that the deeds given under such circumstances are made "in violation of official duty and of the law."

Generally, no one can complain of being misled who has a knowledge of his rights or has the means of learning the same.

Hepburn vs. McDowell, 17 S. & R., 383.
Crest vs. Jack, 3 W., 238.
Carr vs. Wallace, 7 W., 394, 401.
Com'th. vs. Moltz, 10 Pa. St. R., 527, 531–2.
Glidden vs. Strupler, 52 Pa. St. R., 400, 405.

To no one does the rule of *caveat emptor* more thoroughly and properly apply than to a purchaser at a tax sale; and to such purchaser it does apply in full force.

Blackwell on Tax Titles, 4th Ed., 51.

In the mouth of such purchaser, a plea of being misled and of being an innocent purchaser, is as much out of place, as was the plea in the mouth of the criminal who had murdered both his father and his mother, that the Court should bear in mind that he was a poor orphan.

Moreover, not only is the purchaser thus presumed to know whether the assessment of taxes is authorized and legal, and whether the sale is likewise authorized and legal, but, the burden of proof is put upon him to show those facts.

Stead's Ex'rs vs. Crouse, 4 Cranch, 403.
Early vs. Doe, ex. dem. Homans, 16 How., 610, 618.

The Commissioners were simply the agents of the county, and even in the ordinary case of principal and agent their acts outside of the authority delegated to them would not bind their principal, for the liability of the principal depends upon the facts that the acts of the agent

were done, 1st, in the exercise, and 2d, within the limits of the powers delegated.

Hough vs. Doyle, 4 Rawle, 291.

Kerns vs. Piper, 4 W., 222.

B. & O. Relief Ass'n vs. Post, 122 Pa. St. R., 579.

Mechanics' Bank of Alexandria vs. Bank of Columbia, 5 Wheat., 326.

Le Roy vs. Beard, 8 How., 451.

If there was any misleading at these tax sales on either side, it was probably on the other side than that of the Commissioners. The remarks of the Court in *Goodman vs. Sanger, 85 Pa. St. R., 37, 42,* are generally applicable, to wit, "The Commissioners of Northumberland, besides "having no personal interest to quicken their diligence, "were constantly changing; and like other officers of the "county, being chosen from the body of the people, were "not likely to have much knowledge of past county "affairs. Before the end of the five years allowed for re-"demption it is probable no member of the board knew "of the title of the county."

The situation of the case now in hand, is a fair illustration of the situation generally at such tax sales. The Commissioners and the Treasurer, were plain men unlearned in the law; the purchaser, James Pleasants, was a lawyer in active practice in the county.

This decision in *Diamond Coal Co. vs. Fisher,* is thus not only at variance with the current of decisions in Pennsylvania, and in this Court, and in all the States; also, not only at variance with the very principles upon which it professes to be based; but we submit, it must be considered overruled. In *Russel vs. Werntz, 24 Pa. St. R., 337,* it was cited and relied upon, but the decision was to the contrary. Again in the case of *Herron vs. Murphy,*

22d Weekly Notes of Cases, pp. 181–3, where the present subject matter was the especial matter before the Court, it was cited and specially relied upon by the plaintiffs in error in that case; but the decision was again directly contrary to it. The Court apparently considered the law so plainly with Murphy, the present plaintiff in error, that a discussion of authorities was unnecessary, and disposed of the case in a brief *per curiam.* It is therefore not expressly mentioned, but in view of the question before the Court, and the manner it was cited and relied upon, and the decision, it was plainly overruled. And we take leave of it, with the remark, that the attempt thus by judicial legislation, to introduce into the operations of the speculators at land tax sales, the principles of "pure and self-evident morality," is a more vain and profitless endeavor, than that which a somewhat noted Senator pronounced an iridescent dream, to wit, the attempted purification of our American politics.

The objection that a presumption had arisen and become conclusive that the taxes of 1826, 1827 and 1828 had been paid and the land redeemed from the sale of 1828, is equally untenable. It was not disputed that the assessments of the said years were regular and legal; and that the said sale of 1828 was also regular and legal; and that the title to the land was duly conveyed to and became vested in the county. If there were any ground whatever for claiming such a presumption, it would not at any rate be a question of law, but one of fact to be drawn by a jury.

Goodman vs. Sanger, 85 Pa. St. R., 37, 41.

The doctrine of abandonment applies only to imperfect titles. Where the title has been completely obtained from the Commonwealth, there can be no such thing as abandonment by which the title can be lost.

Neglee vs. Albright, 4 Wh., 291, 300.
Bunting vs. Young, 5 W. & S., 188.
Urket vs. Coryell, 5 W. & S., 60, 83.
Bear Valley Co. vs. Dewart, 95 Pa. St. R., 72.
Putnam vs. Tyler, 117 Pa. St. R., 570, 585.

In the present case, the title of the county was perfect. Had there been a redemption, it would have been shown by a deed-poll indorsed on the back of the Treasurer's deed to the Commissioners; see p. 15 of this brief.

The Treasurer's deed, however, remained in the possession of the Commissioners until they sold the land to Murphy, the plaintiff in error, when it was delivered to him.

To say that a perfect title becomes weaker by reason of the lapse of time, and finally is to be presumed abandoned simply because it has been held a long time, is to say that which is distinctly contrary to the ordinary and general understanding; according to which the longer a title to land is held, the stronger it becomes.

The sum of the matter under this assignment is, that the assessments of taxes for the years 1838–1841 upon the Nathaniel Brown tract of land were simply void, for the reasons:

1st. That the Commissioners were never authorized to assess such taxes upon lands held as this tract was at the time, it not being held by either an individual or a company or a body corporate, and not being liable to valuation and assessment for the purpose of raising county rates and levies.

2d. That such valuation and assessment of land held as this tract was at the time, was expressly forbidden by the law.

Therefore such assessments did not authorize a sale by the Treasurer, and his sale in 1842 of the said Nathaniel Brown tract, was a simple nullity and had no effect whatever upon the title to the tract.

Therefore, the learned Circuit Court erred in ruling that the said sale by the Treasurer devested the title of the county to the said tract of land, and in rejecting the evidence of the regular and legal sale of the said tract of land by the Commissioners to the plaintiff in error.

THIRD ASSIGNMENT.

The Court having decided that the sale of 1842 by the Treasurer was a valid sale and conveyed the title to the purchaser thereat, we proposed to meet the defendant in error, plaintiff below, on this his own chosen ground, and show by the like evidence that this title had again been sold from this purchaser and vested in the Commissioners by a subsequent Treasurer's sale in 1846. Very certainly if the Commissioners had the power to assess this tract in 1839–1841, they had the power to do likewise in 1843–1845. And so we offered the same record which the said plaintiff had offered, to show another Treasurer's sale in June, 1846, of the same tract again to the Commissioners. But the Court rejected this also, not because the assessment was void, and the Treasurer's sale void,—which would have been good and proper reasons, only inconsistent with the ruling complained of in our second assignment,—but because some one had made an irregular and unauthorized entry upon the record, to the effect that a little over a year and five months after the sale the taxes had been paid by James Pleasants.

It will be observed that even if this entry were admissible as evidence, it would not be evidence of a redemption. In a few cases, entries of "pd.," or the like, appearing on the Treasurer's sale book, have been sought

to be used as evidence that the taxes had been paid before the sale; for of course, as the Treasurer was only authorized to sell for taxes due and unpaid, a payment of the taxes before the sale, would invalidate a sale. But such attempts have never been successful.

Aukeny vs. Albright, 20 Pa. St. R., 157.

But such claim cannot be made here. Although in the objection, it is not expressly so stated, it could only be legitimately claimed to operate as a redemption, if anything at all, for the entry itself claims nothing more than the payment of the taxes, "Nov. 19, '47," a little over a year and five months after the sale on the 8th day of June, 1846.

But this was not a redemption. As will be seen by the 6th section of the Act of 13th March, 1815, printed on page 15 of this brief, in order to effect a redemption, the owner must pay not only all the taxes, but also the costs due at the time of the sale; and not only this, but he must also pay the interest thereon; and not only this, but he must also pay the taxes for each year after the sale, and interest thereon.

In *Goodman vs. Sanger, 85 Pa. St. R., 37, 41*, where the title to the land had been in the county for fifty-eight years, and it was claimed that a redemption must be presumed, and to show that the taxes had been paid by the Bank of the United States, an entry of "*Pd. B.*" upon the tax record had been produced, the Court says, "The next fact to be remarked is, that there is no record "or documentary evidence of a redemption of right or by "permission, while under the sixth section of the Act "13th March, 1815, the evidence ought to appear both in "the Treasurer's and Commissioners' office. The letters "'Pd. B.' opposite to the entry of the county tax of fifty-

"two cents in the year 1805, clearly is no evidence of re-
"demption."

As will be observed, the said sixth section of the aforesaid Act, makes the Treasurer's receipt, and the deed-poll of the Commissioners indorsed on the back of the Treasurer's deed to them, the proper evidence of such redemption.

But this entry was not admissible as evidence. It was evidence of nothing but the fact that some one had attempted to mutilate the record. And it is worth while to note that the deed from James Pleasants to Charles Pleasants,—see plaintiff's brief of title, Record p. 11,—is dated 20th November, 1847, and this entry relates that the taxes were paid the day previous. In order that the Court may have before it the exact appearance of this entry, we have had the pages of the sale-book photographed, and append them in an appendix to this brief. The different character of this entry, from that of the others on the page will be observed at a glance. In other cases where there was a redemption, the fact is plainly stated, and the amount paid is stated, showing that the twenty-five per centum which was required upon redemption from sales to other purchasers than the Commissioners,—Purd. Dig., 1678, par. 36,—was uniformly required and paid; thus showing that the officials were not ignorant of the law in reference to redemptions. Where such redemptions were made, it does not seem to have occurred to the officer entering the fact, to draw his pen across the name of the purchaser at the sale. But whoever made this entry made it unique in every particular.

It was not shown to be in the handwriting of the Treasurer. And upon its face it does not purport to be in his handwriting, nor an entry made by himself. It rather purports to be an entry made by some one else stating the fact that the taxes had been paid to him. And who-

ever did make this entry seems to have been ignorant of what was necessary to effect a redemption.

In *Coxe vs. Deringer, 78 Pa. St. R., 271, 290–2*, the entry upon the Treasurer's sale-book was "paid before sale." This was twice written, to wit, both on the right and left margins of the entry. A pen had also been drawn across the figures showing the amount of the taxes for the year then in question. The entry was also shown to be in the handwriting of the Treasurer at the time. But the Court ruled that the entry was inadmissible in evidence. As to its being in the Treasurer's handwriting the Court said, p. 291, "Let that be so, and it does not help the "use of an unwarranted and illegal endorsement on a "public record as evidence of a substantive and material "fact. The entry was out of time and out of place."

If the ruling of the Circuit Court, that the sale of 1842, and the assessment of taxes upon which it depended, were regular and legal, was correct, then the entries of taxes and costs, preceding this sale of June 8th, 1846, and the entry of the sale itself, were regular official acts properly entered in their appropriate places, and current order, and were evidence. These were what the plaintiff in error offered. He did not offer the illegal entry as to the payment of taxes. But it being on the book opposite the entries of the taxes and costs and sale, the Court required it to be taken down as part of the entries on the book; and moreover required to be taken down as part of the offer, an entry by some one on the line below, and opposite another tract of land, in the words "audited this year Jan. 4, '48." No evidence was offered as to when or by whom this entry was made. Just by what authority the Court could thus add to the offer we do not know, and as it is beyond our reach, we do not attempt to discuss it. But we do submit that even taking

for granted that it refers to the other entry, and that it was admissible as evidence, it could not elevate the other entry into a redemption from the sale. It will be observed, that no mention of any amount is made in either entry.

If, therefore, the learned Circuit Court did not err in the ruling complained of in our second assignment of error, then we submit that it did err in rejecting the offer as to the sale of 1846, for the obvious reason that, if the sale of 1842 was legitimate and admissible, then the sale of 1846 standing in precisely the same condition, was equally legitimate and admissible. But we think for the reasons hereinbefore stated, that neither of them had any legitimate place in the evidence in this case.

FOURTH ASSIGNMENT.

Undoubtedly, ordinarily, to shut out all the evidence on the one side of a case, would be a simple and effectual way to accomplish a verdict and judgment for the other side. But in this case something more was necessary. The action being ejectment, it was necessary for the defendant in error, plaintiff in the Circuit Court, to affirmatively show title and right of possession in himself, before he could recover the possession from the defendant. For ever since the decision in *Roe d. Haldane & Urry vs. Harvey, 4 Burr., 2484,* it has, we believe, been the universal rule of law both in England and America, that a plaintiff in ejectment can only recover upon the strength of his own title, and that the possession of the defendant gives him a right against every man who cannot show a good title. Such at any rate has always been the law in Pennsylvania.

Welker vs. Coulter, Add., 390.
Covert vs. Irwin, 3 S. & R., 283.
Lehman vs. Howley, 95 Pa. St. R., 295, 300.

Therefore, although the evidence of the title of the defendant in the Circuit Court was all rejected, yet it remained a question whether the plaintiff had shown title to the land warranting a recovery by him. And we submit he had not.

There was only one title from the Commonwealth shown in the case, to wit, a warrant to Nathaniel Brown, a return of survey to him, and a patent to his vendee. But the plaintiff claimed that the warrantee and patentee were simply trustees for a certain Dr. Ruston under whom the plaintiff claimed. This did not change the fact that there was but one title from the Commonwealth shown. *Rush vs. Barr, 1 W., 110.* The evidence upon which the plaintiff based his claim was as hereinbefore stated, simply an entry upon what is known in Pennsylvania as John Keble's blotter. The entry appears in the plaintiff's brief of title, see Record p. 6, showing that on the 14th June, 1794, Dr. Ruston paid on six warrants of 400 acres each sixty pounds, and sixty shillings fees, leaving a remaining charge of one hundred and sixty-eight dollars. And the number on this blotter corresponds with the number of the old purchase voucher, apparently connecting this payment with the six warrants there named, of which the tract in question is one.

It was a practice in Pennsylvania, where parties lived at a distance from the land office, to sometimes have one of their number act as agent for all of them, in taking their applications to the land office, and paying the purchase money and fees. There was also a practice of taking up lands in evasion of the law, one individual taking up more land than the law allowed, by taking out warrants in the names of his neighbors, or even in fictitious names.

Therefore, from the simple fact of the payment of the money no conclusive presumption arises as to whether

the party paying did so for his own use or as agent for others.

The Penn proprietaries had a rule that no one should take out a warrant or location for more than three hundred acres. To evade this it became customary to take out warrants in the names of other parties, or even in fictitious names. This practice was winked at by the proprietary officers. The proprietaries being the absolute owners of the lands, had the right to dispose of them as they chose, and to overlook any disregard of their own rules that they chose. And their officers were clothed with a general authority, in disposing of the lands, not with merely a special, limited authority. When, therefore, it became the known practice in their land office, to permit the taking out warrants in the manner aforesaid, the Court could do no otherwise than recognize such practice, and declare that a resulting trust arose in favor of the party who paid the purchase money. *Cox vs. Grant, 1 Yeates, 164, 166.* And upon this practice and doctrine, were based the earlier decisions upon land titles in Pennsylvania, out of which arose what is known as title by warrant and survey.

But the Revolution changed the situation. On the 27th of November, 1779, there was enacted by the legislature of Pennsylvania a law whereby the title of the proprietaries was devested, and the title to the lands vested in the Commonwealth. *Purd. Dig., 1371.* And by Act of 1st April, 1784, a land office was opened. *Purd. Dig., 1029 et seq.* And now the condition was thoroughly changed. The officers of the land office, instead of having a general power and authority in disposing of the lands of the Commonwealth, now had only such special and limited authority as was conferred by the Act of Assembly. This distinction between the condition under

the proprietaries and that under the Commonwealth is clearly stated in *Barton vs. Smith, 1 Rawle, 403, 406–7*, hereinbefore cited.

The fourth section of the Act of 1st April, 1784, opening the land office, *Purd. Dig., 1030, par. 27*, enacts as follows, to wit:

"The quantity of land granted to any one person shall not exceed four hundred acres; and all grantees under this act, as well as all claimants of unpatented lands whatsoever, are hereby confined to the same time, with respect to patenting, as is limited and directed by the (Acts of 9th April, 1781, and 5th April, 1782.)"

This was thenceforward the law binding upon every individual in the Commonwealth, and upon every officer in the land office just as much as upon every other individual. If any person obtained a warrant or warrants for more than four hundred acres of land after that, he could only do so by practicing a deceit and fraud upon the officers of the land office, or getting them to join with him in a fraud upon the law and the Commonwealth. And the proposition of the defendant in error is, that merely upon the entry of the said payment by Dr. Ruston, on the 14 June, 1794, as it appears on the mere blotter of John Keble, a clerk, here at the outer verge of a century later, the Court is to *presume* that Dr. Ruston either went to the land office with a lie in his mouth, and practiced a fraud upon the same, or got the officials there to join with him in a fraud as aforesaid. It will be observed that this proposition of the defendant in error is supported by no other evidence whatever, except simply the appearance of this payment on this blotter. No act or utterance of Dr. Ruston of any kind, at any time, is shown, claiming a right to this Nathaniel Brown tract

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in himself. On the contrary, the only act and utterance of his, that appears, shows that the right was in Nathaniel Brown. He represented at the land office that he was paying for Nathaniel Brown; and the survey was made and returned to Nathaniel Brown, and the patent was granted to Nathaniel Brown's vendee. All this within the space of three years from the time of the payment of the money, and all without a protest of any kind, or a claim of any kind, on the part of Dr. Ruston himself or any one claiming in his right. Nor was any such claim made by anyone, in such a way that it could be met and set aside, until the dust of nine-tenths of a century had gathered upon this entry on this old blotter. For the first overt act, in the way of asserting a right of possession of this land, made under this claim, was the present ejectment, in which the summons issued May 26, 1884.

It is not to be denied that judicial decision can be found somewhat supporting this remarkable proposition. But that such decision was erroneous, we have the confession and admission of the learned Judge himself who uttered the same. In his work on The History and Nature of Original Titles to Land in the Province and State of Pennsylvania, Judge Huston says at page 336 as follows, to wit:

"I once said, in delivering the opinion of the Supreme Court, that this blotter *always* showed who was the owner of the land. I have since found that this remark was too general. There are a few cases in which the man who paid the money did not state that it was furnished and sent by another; and as John Keble did not know that it was sent by another, he could not put down his name. I know two cases in which this fully and clearly appeared. The most striking instance of this is in the case of the Population Company, who entered many hun-

dred warrants and paid many thousand dollars. John Nicholson was President of that company, and filed all these applications and paid all this money, and thus appears by Keble's blotter to be the owner of all this land. The books of accounts of the Population Company kept at the time, show how much and when each member paid money to the fund. John Nicholson paid in some, but a small portion of the whole. Some other members paid in two, three, or four times as much as he did. If, then, there is clear proof in such cases who really paid the money, such proof will control and correct the blotter. Still, however, the position is generally true, that it will show who was the real owner. Perhaps there is not one case in two or three thousand, where it will mislead us. It seems, then, to come to this, that it is *prima facie* evidence, and conclusive, unless rebutted; but it may be and has been shown to be mistaken in a very few instances; and those instances have not occurred from any fault or negligence of John Keble, but from that of the person who filed the application and paid the money, and did not tell him all that he ought to have told him."

We submit that the proposition of the defendant in error, cannot be sustained.

In the first place, fraud on the part of Dr. Ruston is not to be presumed. *Fraus est odiosa et non præsumenda.*

Secondly, official misconduct is not to be presumed. *Omnia præsumuntur rite et sollenniter esse acta donec* PROBETUR *in contrarium.*

Bank of the U. S. vs. Dandridge, 12 Wheat., 64, 69–70.

Thirdly, a trust will not be presumed in evasion or violation of an Act of the legislature.

Camden vs. Anderson, 5 T. R., 709.

Curtis vs. Perry, 6 Ves. Jr., 739.

Yallop ex parte, 15 Ves. Jr., 60.
Houghton, Gribble, ex parte, 17 Ves. Jr., 251.

Nearly ninety years ago, in *Mitchell vs. Smith, 1 Bin., 110,* where the question before the Court was upon a contract for the sale and purchase of lands under what was known as the Connecticut title, it was ruled in Pennsylvania, that even an express contract in violation of an Act of Assembly, was unlawful and void, though the Act neither expressly says so, nor contains any prohibitory clause. And this decision, in all the course of years and changing circumstances since, has not only never been questioned nor shaken, but has been followed and its ruling repeated in a large number of decisions even down to the present day.

Thorne vs. Travellers' Ins. Co., 80 Pa. St. R., 15, 28, and cases cited therein.

The decisions in *Fowler vs. Scully, 72 Pa. St. R., 456,* and *Holt vs. Green, 73 Pa. St. R., 198, and the cases cited in them,* ruling that an action cannot be maintained in Pennsylvania founded on a violation of a United States law, show the extent to which the ruling prevails in that State. In *Fowler vs. Scully,* at page 467, the Court says, "There "is, therefore, no room for equitable presumptions, or es- "toppels, in cases of illegal contracts," and citing numerous authorities in support of the statement.

In *Holt vs. Green,* at page 201, the Court says, "His "case as he exhibits it is based upon a clear violation of "the statute. He grounds his action upon that violation. "Thus resting his case, he cannot successfully invoke the "aid of a Court."

In the present case, the claim of the defendant in error, can only be made by asserting that Dr. Ruston purchased

at one and the same time, six warrants of four hundred acres each; thus it is based wholly upon an allegation of a plain violation of the Act of Assembly above quoted. But "Courts of justice are instituted to carry into effect "the laws of a country, and they cannot become auxiliary "to the violation of those laws."

Bank of the United States vs. Owens et al., 2 Pet., 527.
Hall vs. Coppell, 74 U. S., 542.

Fourthly: The evidence upon which the claim is made, does not show the full payment of the money necessary to secure the title; and it is only upon such full payment that a resulting trust arises.

Nixon's Appeal, 63 Pa. St. R., 279.
O'Hara vs. Dilworth, 72 Pa. St. R., 397.
Earnest's Appeal, 106 Pa. St. R., 310.
Olcott vs. Bynum, 84 U. S., 44.

Fifthly: The records of the land office, and also the acts and conduct of all parties to the transactions, contradict the claim now set up by the defendant in error. As we have before mentioned, Dr. Ruston's own acts and declarations were that he was acting simply as the agent for Nathaniel Brown. And his not paying the small balance remaining unpaid is to the same effect. The act of the deputy surveyor in surveying and returning the land for Nathaniel Brown; the act of the Surveyor-General in accepting the return of survey; the act of Nathaniel Brown in making a deed to Peter Grahl; and the act of the officials in granting a patent to Peter Grahl; these are all positive acts contradicting the claim now made, and showing that all parties understood this to be the land of Nathaniel Brown. These acts constitute that contemporaneous exposition which as to matters of the long ago, is of especial force. *Contemporanea expositio est optima et fortissima in lege et accipienda.*

It is not to be denied, that cases can be found in Pennsylvania, in which the sound principles and rulings above cited, have been wholly overlooked. But we do not understand that the principle expressed in the term *stare decisis et non quieta movere*, requires us to imitate all the oversights and omissions of our predecessors. Such servile imitation, is like that of the Chinese tailor, who being desired by an Englishman to make for him a pair of breeches, and receiving an old pair as a model, and these happening to have been worn through at a certain part and a patch put thereon, he so exasperatingly followed copy, that he carefully rubbed a hole in the same place in the new pair, and put thereon a patch of the same size and shape as that on the old. Surely this principle does not require such imitation from us. There are faults and failures in the best of human action; and when in judicial action faults have become as manifest as the light of the open day, we are certainly not bound to go on repeating these faults, and thus make them perpetual. We are simply required to follow in the regular current of decision which flows in the due course of the law, but not to turn aside into every eddy formed by irregularities on either side.

As we said above, the doctrine of resulting trusts from payment of the purchase money and fees, attaching to warrantees and patentees, arose under the practice in the proprietaries' land office, where it was permissible. But the distinction and difference between the conditions in the land office of the proprietaries and in that under the Commonwealth, have not always been kept in mind, and by reason thereof some of the cases are at fault.

Sixthly: The evidence presented by the defendant in error to support his claim, originally defective, has become through the lapse of time wholly ineffective.

In many of the cases above cited under this assign-

ment, the evidence for the claimants was complete, and their claims fully proved, instead of resting upon merely alleged presumption. But even thus they failed to make out a resulting trust. In this case, the evidence presented by the plaintiff in the Circuit Court was never complete. The character of his evidence is expressly declared in *Fox vs. Lyon, 27 Pa. St. R., 9, 15–16,* to be merely private memoranda, and not public records,—not even of as high a grade as the oath of a living witness, and only received *ex necessitate rei,* after all other evidence is supposed to be extinct. And that the evidence of these "blotters" found in the land office, after twenty-one years from the date of the transaction, cannot be received to contradict the records "made and kept, 'not for a day, but for all time,' as perpetual memorials of the truth," is expressly ruled in the said case of *Fox vs. Lyon,* and also in *Strimpfler vs. Roberts, 18 Pa. St. R., 283.* And the principle of these decisions is fully recognized and repeated in *McBarron vs. Glass, 30 Pa. St. R., 133,* and *Halsey vs. Tate, 52 Pa. St. R., 311.*

Seventhly: If at any time, Dr. Ruston or any one claiming under him could have enforced a resulting trust as to this land, such right was finally and effectually barred on the 23d day of April, 1858, by reason of the sixth section of the Act of Assembly of 22d April, 1856, *Purd. Dig. 1064, par. 14,* which was enacted to finally and forever bar the setting up of these old claims of resulting trust, which had become more than a crying evil. It gave two years from the date of enactment to all who would be sooner barred by it. The enactment is as follows, to wit:

"No right of entry shall accrue, or actions be maintained for the specific performance of any contract for the sale of any real estate, or for damages for non-compliance

with any such contract, or to enforce any equity of redemption, after re-entry made for any condition broken, or to enforce any implied or resulting trust as to realty, but within five years after such contract has been made or such equity or trust accrued, with the right of entry; unless such contract shall give a longer time for its performance, or there has been, in part, a substantial performance, or such contract, equity of redemption, or trust, shall have been acknowledged, by writing, to subsist, by the party to be charged therewith, within the same period: *Provided*, That as to any one affected with a trust, by reason of his fraud, the said limitation shall begin to run only from the discovery thereof, or when, by reasonable diligence, the party defrauded might have discovered the same; but no *bona fide* purchaser from him shall be affected thereby or deprived of the protection of the said limitation: *And provided*, That any person who would be sooner barred by this section, shall not be thereby barred for two years from the date hereof."

Eighthly: All title in either Dr. Ruston, or the patentee, or the successors of either of them, was conveyed to the County of Columbia, by the Treasurer's sale for taxes in 1828, and his deed consequent thereon, to the Commissioners of said county.

The land was properly and regularly assessed in the name of the warrantee Nathaniel Brown, for the years 1826 and 1827; these taxes remained due and unpaid for the space of one year; they were regularly certified to the Treasurer, and he regularly made sale of the land for these taxes and costs to the said Commissioners, on the second Monday of June, 1828, and made and delivered to them his deed for the said land dated August 8th, 1828. The regularity and validity of the assessment of taxes, and of the Treasurer's sale therefor, was not disputed in the Circuit Court, and is indisputable. It is

therefore plainly undeniable, that the title to the land, by whomsoever theretofore held, passed by the said Treasurer's sale and deed to the said county; and there having been no redemption made, after five years the title became absolutely vested in the county. And after five years from the said sale, and the delivery of the Treasurer's deed, the previous owner or owners, whoever they may have been, were completely barred from bringing any action for the recovery of the said land by the limitation enacted in the third section of the Act of Assembly of the 3d April, 1804, which is as follows, to wit:

"No action for recovery of said land shall lie, unless "the same be brought within five years after the sale "thereof for taxes as aforesaid. *Purd. Dig. 1679, par. 37.*

This limitation is in full force in Pennsylvania.
Robb vs. Bowen, 9 Pa. St. R. 71.
Sheik vs. McElroy, 20 Pa. St. R., 25.
Johnson vs. Jackson, 70 Pa. St. R., 164.

Thus it fully appears, that after five years from the said sale and delivery of the Treasurer's deed to the said Commissioner's, there remained neither in Dr. Ruston, nor in any successor of his, any title to the land, or right of action for the recovery of the land, which could be made of any avail as a ground of recovery in the present action. The only title to the land then existing anywhere, was that held by the county. And that could be sold by the Commissioners only in one way, and that by a public sale by them, duly advertised. And the only sale thus made by them was that made to the present plaintiff in error.

Ninthly: The defendant in error, apparently realizing that title from the county must be shown after the said

sale by the Treasurer in 1828, attempted to show a transfer of said title to himself; but this attempt resulted in plain failure.

He did not even attempt to show a sale by the Commissioners; for he could show none except that to the plaintiff in error. He simply showed a sale by the Treasurer in 1842, for taxes claimed to be assessed upon the tract for the years 1838–1841. As will be seen by reference to the Act of 3d April, 1804, authorizing the valuation and assessment of unseated lands, quoted on page 20 of this brief, such valuation and assessment was simply "for the purpose of raising county rates and levies."

Therefore, the proposition of the defendant in error, involves the monstrous absurdity, of the Commissioners assessing and causing the sale of the property of the county itself, "for the purpose of raising county rates and levies." As we have hereinbefore shown, the Commissioners were never empowered to practice any such abnormal and suicidal freaks. And after the discussion hereinbefore presented, we suppose it sufficient here to repeat, that the Treasurer's sale of 1842 was simply void and conferred no title; it being wholly based upon an assessment of taxes which was plainly void, because, 1st, it was never authorized by any law, and 2d, it was expressly prohibited by the law. And still further, that even if it could be successfully claimed that the said sale of 1842, furnished any entity whatever, that was wholly destroyed by the precisely similar process of assessment for the years 1843–1845, and the consequent Treasurer's sale of 1846, again to the Commissioners.

Thus the claim of tax title, on part of the defendant in error, is even more unsubstantial than that by way of resulting trust.

At the trial in the Circuit Court, there was cited by the plaintiff there, the case of *Herron vs. Dater, 120 U. S., 464,*

as supporting his claims. It needs but a little examination, to show that such citation was a misuse of that case. The question there presented, and to which the attention of the Court was specially directed, was whether a title by warrant and survey attended with payment of the purchase money, was a sufficient title to support an ejectment. In view of the law in Pennsylvania, it was an idle contention to claim the contrary. And the decision in that case was further based upon the fact that possession of the land had been taken and held by the parties claiming by warrant and survey.

And more especially is that case distinguished from the present, by the fact, that in that there was no question as to the validity of a tax sale of the land, which in this case is the principal question.

To sum up as to this assignment, everything presented by the plaintiff in the Circuit Court, was either an immaturity, or an abnormity, or a non-entity. In the way of conferring title, taken either singly or collectively, they amounted to nothing. And *ex nihilo nihil fit.* Therefore, we submit, that the learned Circuit Ceurt erred in ruling that under the evidence in the case the plaintiff was entitled to recover, and directing a verdict in his favor.

FIFTH ASSIGNMENT.

In this Court, and upon this hearing, the offers of evidence made by plaintiff in error as defendant in the Circuit Court, are to be taken as substantiated. Therefore, we submit finally, that the plaintiff in the Circuit Court having presented only a bundle of nullities, and the defendant having presented as set forth in his brief,—see Record p. 12,—a title regularly obtained from the Commonwealth; this title regularly conveyed to the Commis-

sioners of Columbia County; and subsequently, by the said Commissioners regularly conveyed to himself; the verdict and judgment of the Circuit Court should have been given in his favor instead of in favor of the plaintiff. And he therefore prays that the said judgment may be reversed and annulled, and he be restored to his rightful title and possession of the land in controversy.

Respectfully submitted,

A. RICKETTS,

Counsel for Plaintiff in Error.

APPENDIX.

PATENT.

THE COMMONWEALTH OF PENNSYLVANIA.

To all to whom these presents shall come, Greeting:

KNOW YE, That in consideration of the moneys paid by Nathaniel Brown, into the Receiver General's office of this Commonwealth, at the granting of the warrant hereinafter mentioned and of the sum of seven shillings and six pence lawful money now paid by Peter Grahl in the said office, there is granted by the said Commonwealth unto the said Peter Grahl, a certain tract of land called "Friendship," situate in Catawissey township, Northumberland county. Beginning at a post, thence by land of Ebenezar Branham north twelve degrees west one hundred and twenty-four perches to a post, thence by land of John Young and Mary Ruston west four hundred and fourteen perches to a post, thence by land of Thomas Ruston south sixty perches to a post, thence by land of Lewis Walker south seven degrees east one hundred and thirty-seven perches to a post, and thence by land of Thomas Ruston in right of Robert Gordon and land of Andrew Porter north eighty degrees east four hundred and thirty perches to the beginning; containing four hundred acres and allowance of six per cent. for roads, &c. (Which said tract was surveyed in pursuance of a warrant dated 26th November, 1793,—granted to the said Nathaniel

Brown, who, by deed dated 27th November, 1793, conveyed the same to the said Peter Grahl,) with the appurtenances.

To have and to hold the said tract or parcel of land, with the appurtenances, unto the said Peter Grahl and his heirs to the use of him the said Peter Grahl his heirs and assigns forever.

Free and clear of all restrictions and reservations, as to mines, royalties, quit-rents or otherwise, excepting and reserving only the fifth part of all gold and silver ore for the use of the Commonwealth, to be delivered at the pit's mouth, clear of all charges.

In Witness Whereof, Thomas Mifflin, Governor of the said Commonwealth, hath hereto set his hand and caused the State seal to be hereunto affixed, the thirtieth day of April, in the year of our Lord one thousand seven hundred and ninety-seven.

Tho. Mifflin, [s.]

Attest: James Trimble, Deputy Secr'y.

Inrolled the 18 day of April, 1797.

I do hereby certify, That the within is a true copy of a Patent as recorded in Patent Book "P," volume 31, page 413, now remaining in the Department of Internal Affairs of Pennsylvania.

{ Seal of Department of Internal Affairs. } In testimony whereof, I have hereunto set my hand and caused the Seal of said Dement to be affixed, at Harrisburg, the nineteenth day of June, A. D. 1884.

J. Simpson Africa,
Secretary of Internal Affairs.

FILED
NOV 22 1893
JAMES H. McKENNEY,
CLERK.

DEFENDANT'S BRIEF.

Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM NO. 107.

CHARLES G. MURPHY,
Plaintiff in Error,

vs.

ELISHA A. PACKER.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

JOHN W. RYON,
JAMES RYON,
S. P. WOLVERTON,
Attorneys for Defendant in Error.

Supreme Court of the United States!

OCTOBER TERM, 1893.

TERM NO. 107.

CHARLES G. MURPHY,

Plaintiff in Error,

vs.

ELISHA A. PACKER.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

BRIEF OF ARGUMENT ON THE PART OF THE DEFENDANT IN ERROR.

The title of the Defendant in Error was a legal title based upon a warrant issued by the Commonwealth of Pennsylvania, a survey of the land in controversy and a return thereof to and the acceptance by the land office in 1795, and the payment of the purchase money by Dr. Thomas Ruston, under whom the defendant in error claimed before the said warrant was issued. The defendant's title was accompanied with a continuous

claim and acts of ownership from the date of the survey down to this trial, by payment of taxes for three-quarters of a century, and by sundry conveyances of the land for large and valuable consideration during that period, when it became vested in the defendant in error in 1864.

The plaintiff in error on the other hand derives his claim of title from a sale by the Commissioners of Columbia County, in 1882, and the claim of the Commissioners is derived from a sale by the County Treasurer to the Commissioners in 1828, for taxes assessed for the years 1826, 1827 and 1828.

It is claimed by the defendant in error:

1. That a warrant, survey and return thereof, and acceptance by the Commonwealth and the payment of the purchase money by Dr. Ruston vested a legal title in Dr. Ruston, whose title the defendant in error holds.

2. The patent offered by plaintiff in error was fraudulently procured by Peter Grahl, but whether fraudulently procured or not, under the laws of Pennsylvania and decisions of her courts as well as the decisions of this court enures to the benefit of the title of defendant in error.

3. That as Dr. Ruston was the owner of the title under the warrant and survey, the judgment of 13 October, 1796; No. 44, April session, 1796, Clayland for use of Gibson vs. Thomas Ruston, in the Circuit Court of the United States, Eastern District of Pennsylvania, became a lien thereon, prior to any right under the patent in 1797 to Peter Grahl, and the sale by the Marshal

of the Eastern District of Pennsylvania, to Le Favre, under whom the defendant in error holds, the whole title, as well the Grahl title under the patent as the title of Dr. Ruston became vested in the purchaser Le Favre under whom the defendant in error claims.

4. The defendant in error put in evidence, (see printed record, page 11) assessments of the Nathaniel Brown tract in Roaring Creek township, Columbia County, for the years 1838, 1839, 1840 and 1841; that the taxes for those years were unpaid on said land and were duly returned to the Treasurer to be sold; that the Treasurer of Columbia County sold the same on the 13th day of June, 1842, to James Pleasants, under whom the defendant in error claims and acknowledged a deed therefor on 17th August, 1842. It is claimed by the defendant in error that under the laws of Pennsylvania and the decisions of our court that this sale in 1842 defeated the title of the County Commissioners derived from the Treasurer's sale in 1828, if it was not an abandoned and derilect title from lapse of time, and presumption of redemption by the owner.

If these propositions are sustained, then the plaintiff in error was defending without evidence or color of title.

The defendant in error put in evidence two contemporaneous papers from the land office of Pennsylvania, to wit: The old purchase voucher No. 12,969, and the old purchase blotter No. 12,969, as evidence that Dr. Thomas Ruston applied for and took out the

warrant to Nathaniel Brown and five other warrants, and paid the purchase money. These will be found on page 6 of printed record.

The old Purchase Voucher and the entry of same number in the old Purchase Blotter are cotemporaneous papers. The old Voucher was made out by the Secretary of the Land Office from the application for warrants, and which was a copy of the application, if all the warrants were issued, but if not a copy of so many as were issued, and sent to the Receiver General, in order that the purchase money might be paid to the Receiver General who had the right to receive the purchase money. Judge Huston, in his treaties on Pennsylvania Land Titles, gives the practice of the Land Office, page 443, as follows :

"After the Revolution, when warrants issued under the acts of assembly, the purchase money was paid on every one before the warrant was sealed. The application and entry in the books of the Secretary of the Land Office, continued as before the war. The warrant was carried to the Receiver General, or filled up by him, and then he received the price, and affixed the lesser seal of the State on it. It was then signed by the Governor ; (since by act of Assembly, by one of the officers of the Land Office ;) this was directed to the Surveyor General who entered it in his book, and endorsed the county, number of acres and date on the back of it. This is what is called the original warrant, and it remained in the Surveyor General's office. The Surveyor General made out an exact transcript of it, directed to Deputy Surveyor of the District in which it lay ; 'ex-

ecute this warrant and make return of survey according to law.'

"From this voucher with the original warrant John Keble made an entry in a day book which he kept as chief clerk in the Receiver General's office, showing the number of warrants, acres, who paid the purchase money, &c., and this day book was called "The Old Purchase Blotter." Keble also made the entry on the voucher of the same number, as of the entry in the blotter, as in the present case it is No. 12,969, see printed Record, page 6, and also generally entered on the voucher the amount of purchase money and its payment, by the short statement: "A general receipt wrote," as in the present case, and meaning that the fees and purchase money were paid in full. These two papers were resorted to, to show payment of purchase money and Keble's blotter always showed who paid it."

These two papers were received in evidence by our courts to show ownership of warrants and certified copies were made evidence by the act of 1823.

They were offered in evidence in this case for this purpose, and no evidence was given or offered to contradict this effect; under such a state of facts the prima facie case became conclusive proofs, and they were properly admitted and the charge of the learned court was entirely correct, and the learned court could have said no less. The case of Oliphant vs. Ferren, 1 Watts 57, decides that copies of entries in the books of the land office (meaning John Keble's blotter,) duly certified are competent evidence to prove the real owner of a warrant. This case presents the practice of the land

office and the value of Keble's blotter, for which we respectfully refer the court. We quote from the opinion of the court: "Before this act, the possession of the original receipt for the purchase money, or the testimony of J. Keble in his lifetime, or proof of his hand writing and entry in these books, was evidence. This act, it is notorious, had an especial reference to these books, and since its enactment such copies are evidence; not conclusive, but are evidence of who paid the money on any warrant or list of warrants. Most of the warrants which issued from 1784 till 22d September, 1794, issued in the names of persons who had no interest in them, and *often in fictitious names.* The real owner procured conveyances from the warrantee when he was going to patent or sell; but many have never been sold or patented and many owners of warrants and land became insolvent or are dead. Attempts to prove ownership of warrants surveyed and returned, but not claimed by any person, have occurred in cases fair and honest, and in cases not of that description; proof of who actually paid for a warrant, is among the most *unequivocal evidence of ownership*, though not always conclusive. The dates appear wrong, but are easily understood when we understand the practice of the land office. The last part of the document, and the last of the applications for warrants is dated 5th of April, and filed on that day in the office of the Secretary of the land office. Although it gave no right until the purchase money was paid to the Receiver-General, yet the practice was (I don't say it was a good one,) to give the warrant, when it was issued some weeks or months after, the date of the ap-

plication, and the title to the land has turned on the proof of this fact. The paper offered was evidence."

Although the statute of Pennsylvania permits only one warrant to issue to the same person, yet, by the universal practice under the law, an individual may take out any number of warrants in the name of different persons, who are considered as merely nominal and trustees for him who pays for the warrants and has them executed.

Huidekoper vs. Burrus, I Wash. C. C. R.,257.

It is not necessary to produce the deed poll, from the person in whose name the application was made for a tract of land in order to support the title of the plaintiff in an ejectment for the land; the plaintiff having obtained the warrant and paid the purchase money.

Willink vs. Miles, Peters C. C. R., 429.

This court decided in Evans vs. Patterson, 4 Wallace Rep., 224, Grier, Justice, as follows:

"Pennsylvania, until late years, had no courts of equity. Hence, in an action of ejectment, the plaintiff might recover without showing a legal title. If he had a prior incohate or equitable title, either as a trustee or cestui que trust, he might recover. The courts treated the applicant, or warrantee, as trustee for the party who paid the purchase money, or paid even the surveying fees; for the purchase money, under the location or application system, was not paid at the time, and sometimes never. When the State succeeded to the title of the proprietors, the application system was abandoned,

and warrants were granted on payment of the purchase money for the number of acres for which his warrant called. Hence, where the claimant of the warrant was unable to show his deed poll, he might recover by showing that he paid the purchase money; that the warrantee, whose name was used, was therefore trustee for him. And an ejectment might also be maintained in the name of the warrantee, although he had no beneficial interest in the land and no knowledge of the institution of the suit. See Campbell vs. Galbreath, 1 Watts, 78, and also Ross vs. Barker, 5 Watts, 391, which was decided on the title now in question."

A warrant, since the Commonwealth succeeded to the titles of the proprietors, was not issued until the purchase was paid. Written out, the entry in old purchase blotter means: "*Dr. Ruston purchased* 6 *warrants of* 400 *acres each; amount of acres.* 2,400 *; at* 50 *shillings per* 100 *acres; paid for in specie; whole charge,* 60 *pounds. The fees were* 60 *shillings paid, and the remainder of the charge* (*or the purchase money*) *was* 168 *dollars.*" The entry in the old purchase blotter and the entries made at the same time on the old voucher, show the purchase money paid. The entry on the old voucher is: "Genl. rec't wrote," which means that the fees and purchase money were paid and a general receipt for both were given. The following decision will explain the practice of the office at that period:

Justice Washington, in Brown vs. Galloway, Peters, C. C. R., 291, said: "A warrant for land is, according to long and uniform practice, dated on the

day the application is made for the land, although it is retained in the office until the purchase money is paid, when, and not before, it issues to the party."

Same effect is Lewis vs. Meredith, 3 Wash, C. C. R., 81.

It is an established rule of property in Pennsylvania, that the party who paid for the land was the owner of the warrant. This principle was established from reasons of policy and private justice. The deputy surveyor was restrained from surveying more than 400 acres to one person. The limit was 300 acres under the proprietary system. There was, however, no express limit to the amount one person might buy, and hence in the purchase of a large number of warrants, names of persons were used, often fictitious, and in the language of Justice Washington, in Huidekoper vs. Burros, 1 Wash., C. C. R., page 114, "*whenever one person takes out many warrants he borrows the names of certain persons, no matter who they are.*" It became a question very early to ascertain the ownership of the warrant and this was ascertained by ascertaining who paid the purchase money. Often receipts were given with the number of warrants and acres, and when these were in existence they were sufficient. But time soon made this mode of proof, if it ever existed, impossible. John Keble was chief clerk in the Receiver General's office, and he kept a book in which he entered every purchase with its number, date, who was the purchaser and Nos. of warrants, acres, and who paid the purchase money. This from necessity was the only other evidence, and hence the courts resorted to it. In 1823 certified copies were made evidence. Judge

Huston, in his work on land titles in Pennsylvania, says of this Old Purchase Blotter: "Even on warrants where money was paid, there was sometimes difficulty as to who was the owner. The warrant being in a name different from that of the claimant on its face, proved nothing. Where the owner, when he took out his warrant, took a receipt for his purchase money and preserved it, this often decided the question of ownership, and it became usual for a plaintiff to recover on such a receipt, without producing any conveyance from the person whose name was used in the warrant. But where the owner either took no receipt, or it was lost or mislaid, the ownership must be proved by other means. The common books of the land office charged the warrantee with the land and credited him with the payment of the money. When it became necessary to pay money before you got the warrant, and while John Keble was chief clerk in the Receiver General's office, he kept an account of who paid the money on every warrant sealed in that office. The entry, however, is not easily understood, except by those acquainted with the office. Every application was numbered successively, as they were handed in, from one up to near twenty thousand. Some of these applications were for a single tract, and many for more than one hundred, the last written on a single sheet of paper, or several sheets attached together. On each of these was marked the date when filed, and the name of the man who paid the money always appeared. When you applied for a warrant, there were marks by which you could refer to and find the application, and from the application and its number and date, you could find the entry in John Keble's blotter, and there

see who paid the purchase money. The right to many tracts has been ascertained by searching as here mentioned ; and a copy of that blotter under seal of office is now evidence in a court of justice, by a particular act of Assembly. So careful was John Keble that if the person who paid the money told him by whom it was sent, that also appeared in the blotter."

The defendant in error offered old purchase voucher No. 12969, for six tracts of land of four hundred acres each, among them is the Nathaniel Brown tract, described in the application as follows: Nathaniel Brown applies for four hundred acres of land adjoining Dr. Thomas Ruston's other land in Catawissa township, Northumberland county. Each of the six tracts calls for Dr. Thomas Ruston's other land, and contain evidence that the application was by and for Dr. Thomas Ruston.

This evidence was followed by certified copy of old purchase blotter No. 12969. The entry is as follows :

12969.

1794.

June 14, Dr. Ruston 6 wts. of 400 ea., amt. 2400 a 50 s pct. pd specie ch £60.

Rectd fees 60 s. pd Rem. ch of 168 Ds.

This entry clearly shows that Dr. Ruston bought and paid for the six tracts of land for which warrants were granted on application No. 12969, at the rate of fifty shillings per hundred acres the price fixed by an Act of Assembly of April 3, 1792.

Surveys were made upon the warrants in the month of October and November, 1794, (see printed record, page 5,) and returned into the land office 23d of February, 1795. The purchase money was paid by Dr. Ruston before the warrants were issued, and the old blotter not only showed its payment, but the fees for issuing the same and accepting the return of the surveys. The practice in the land office in respect to the payment of the purchase money before the warrants would be issued, is stated by Huston on Land Titles, page 323, in the following language: "I have reason to believe, and do believe, that after the 1st day of September, 1769, no warrant was sent to a deputy surveyor until the purchase money had been paid. The warrant, when made out, was dated on the day the application for it was entered, although the warrant itself was not filled up and signed and sealed until money was paid into the Receiver General's office." The copy, of the old purchaseblotter duly certified, under the seal of the land office, was offered in evidence as a link in the chain of evidence to show title in Dr. Ruston, under whom the plaintiff claims title to the land in suit. The question was not as to the weight to be given to the entries in the blotter, but was the record evidence for the purpose of showing title in Dr. Ruston. The paper came from the depository where we go for original titles to every acre of land in the State of Pennsylvania. Copies of the old purchase blotter are made evidence by Act of Legislature of the State for the purpose of showing who paid for lands, and as a consequence who bought from the State, paid the State the price

demanded, and in law, and fact, who the owner of the land was at the very inception of the title.

Campbell vs. Galbreath, 1 Watts, 70, held that to establish ownership of warrant competent to prove in ejectment that they, under whom party claims, took it out of the office, put it in hands of Deputy Surveyor, employed chain carriers, procured survey to be made and paid expenses. This was admitted to show ownership of warrants.

Ejectment by the common practice in Pennsylvania, where more than one warrant issues to one person, who is considered merely as a nominal person, the title being in him who pays the money to the office and obtains the warrant. James vs. Gordon, 1 Wash. C. C. R., 338.

That as Dr. Ruston was the owner of the title under the warrant and survey, the judgment of 13 October, 1796, No. 44; April session, 1796, Clayland for use of Gibson vs. Thomas Ruston, in the Circuit Court of the United States, Eastern District of Pennsylvania, became a lien thereon, prior to any right under the patent in 1797, to Peter Grahl, and the revival of the judgment to No. 13, October session, 1801, (see Printed Record page 6,) and the sale by the Marshal of the Eastern District of Pennsylvania to Le Favre, under whom the defendant in error holds, the whole title, as well the Grahl title under the patent as the title of Dr. Ruston became vested in the purchaser Le Favre under whom the defendant in error claims.

1793, over six months before the warrant issued or was paid for, and if such a conveyance could have any effect at all, which we deny, then we say Peter Grahl had no better position than Nathaniel Brown. But no such conveyance was offered in evidence and the plaintiff in error relied upon the recitals in the patent, which were not evidence against Dr. Ruston and the defendant in error claiming under him.

That the Court was right in rejecting this patent and the recitals was settled by this court, in the case of Jane Heron, et al., vs. Philip Dater, et al., 120, U. S., 464. The tract involved was the Lewis Walker, a tract of this block of six surveys of which Nathaniel Brown was one, all taken out and paid for at one time, and surveyed at the same time as a block for Dr. Ruston. This Grahl patent was offered for the same purpose as in the present case, and rejected by the Court which was assigned for error.

This Court held (Mr. Justice Matthews delivered the opinion of the Court.):

"The next assignment of error is founded upon the refusal of the Court to admit as evidence the certified copy of the patent from the Commonwealth of Pennsylvania to Peter Grahl, dated April 12, 1797, with a recital therein of the fact that Lewis Walker, by deed dated November 27, 1793, had conveyed the tract in question to Peter Grahl. The legal title of Thomas Ruston to the premises in dispute, established by the warrant and survey and payment of the purchase money, was perfected by the return made by the deputy surveyor into the land office on February 23, 1795.

According to the doctrine established by the authorities already cited. it was not competent for the Commonwealth of Pennsylvania to affect that title by a subsequent patent to a stranger. Peter Grahl, the patentee, was not connected with the title under the warrant and survey, otherwise than by the recital contained in the patent itself, that the tract had been previously conveyed to him by Lewis Walker. Clearly, that recital was not evidence against the plaintiffs, for, if the patent could not take effect against them without it, it could not give any effect to that recital. Their right had already vested prior to the existence of the patent and the grant to them could not be affected by a subsequent grant to a stranger. That such is the uniform course of decisions in Pennsylvania appears by numerous cases: Penrose v. Griffiths, 4 Binn, 231 ; Maclay v. Work. 5 Binn, 154 ; Woods v. Wilson, 37 Pa., 379 ; Delaware & Hudson Canal Co. v. Dimmock, 47 Pa. 393 ; Urket v. Coryell, 5 Watts & S. 60 ; Balliot v. Bauman, 5 Watts & S. 155 ; Smith v. Vasbinder, 77 Pa. 130."

Such also is the rule in Pennsylvania.

The only offer to connect Peter Grahl with Nathaniel Brown was by this recital. The original deed poll was not offered and the conclusion is the plaintiff in error did not have it, and as these deeds poll were as often made by the patentee as by the warrantee, and often right in the land office, such recital in a patent was never regarded in Pennsylvania as any evidence that such a deed ever existed, except as against a party claiming under the title of the patentee by conveyance subsequent to the date of the patent. Hence the patent with-

out the recital was not evidence, and the rule of law, not only in Pennsylvania, but in the United States Courts is that recitals in a deed are not evidence against a stranger or one claiming by prior right to the date of the deed and the recital is not sufficient evidence of the deed recited so as to carry the date of the recited conveyance back of the date of the deed containing the recital. The recital is evidence against a party claiming title under the deed by conveyance subsequent. The peculiar system of granting lands by the Commonwealth of Pennsylvania has made it necessary to give effect to warrants, surveys and patents so as to reach the real merit of each case without regard to who may have the paper title. The whole body of the public lands in the State were sold between the years of 1792 and 1795, and generally in large number of warrants, to speculators, but the State has continued ever since to grant warrants and survey lands already granted, surveyed, returned and patented. The reason is that no system of survey was adopted by which the land surveyed could be located definitely by the officers in the land office, and therefore a warrant was granted for any lands applied for, notwithstanding a prior grant, and patent issued upon the second warrant. The State, therefore, has in most of the lands received pay twice and often three times, and two or more patents have been issued to different warrantees for the same land. And these are not merely exceptional cases. Hence, we have in Pennsylvania a system *sui generis*. The patent does not have the same force or character it has when issued by the Government of the United States. It is not the question, "who has the patent, but who is

entitled to it?" The patent inures to the benefit of the owner, whoever he may be. It confirms the title of the owner, whoever he may be, without regard to the person to whom the patent was issued.

The patent is but a confirmation of the warrant and survey. If it embrace more land than is surveyed it is void for the excess is against a subsequent warrantee.

Delaware and Hudson Canal Company vs. Dimock, 45 Penna. St. R., 393.

A patent which embraces land not included in the survey is void for the excess.

Kelly vs. Graham, 9 Watts, 116.

Though a patent conveys the legal estate against the Commonwealth, it will not prevail over a prior estate by warrant and survey.

Maclay vs. Work, 5 Binn, 154, 6 Sergt. and R., 118.

Woods vs. Wilson, 37 Penna. St. R., 370.

A patent enures to the benefit of the owner of the title, though issued to another.

Urket vs. Coryell, 5 W. & S., 60.

Patent is not notice of the equities of a prior owner of the settlement right.

Woods vs. Wilson, 37 Penn. St. R., 379.

Patent does not locate the tract, but defines how much land the tract is to contain when located.

Hagerty vs. Mathers, 31 Penna., 348.

If a man wrongfully obtain a pat nt for land and pay the taxes, the real owners may recover it from him without reimbursing to him the costs of patenting and the taxes.

Urket vs. Coryell, 5 W. & S., 60.

A patent is not operative against the rights of a third person existing before the issuing of the patent. He may show that his right is better than that of him who obtained the patent, and for that purpose may inquire into the prior title of the patentee, whether by warrant, survey, settlement or otherwise, and show that his equitable title is better. Such patent may be impeached if tainted with fraud, procured by imposition or in entire excess of the proceedings in which it is founded.

Balliet vs. Bowman, 5 W. & S., 155.
Smith vs. Vasbinder, 77 Pa. St. R., 130.

A patent is but prima facia title against prior claimants, and that a purchaser without notice of prior title and for value from the patentee is, in this respect, in no better position than the patentee.

Woods vs. Wilson, 1 Wright, 382.
Lewis vs. Bradford, 10 Watts, 76.
Duer vs. Boyd, 1 S. & R., 203.
Urket vs. Coryell, 5 W. & S., 60.
Maclay vs. Work, 5 Binney, 154.
Gingrich vs. Foltz, 7 Harris, 40.

In the United States, a patent issued by the United States, like the deed of an individual, is inoperative if the government never owned the property, or

had previously conveyed it, or had dedicated it to uses which precluded its sale. But the validity of a patent of the United States Government to land cannot be assailed collaterally, because in issuing the patent the act in issuing the patent is *judicial.*

Steel vs. St. Louis Smelting and Refining Company, 16 Otto, 447.

In Pennsylvania, however, the officer in granting a patent acts ministerially, and not judicially, and their patent is only prima facia evidence of title.

Burk vs. Seabold, 6 Serg. & Rawle, 140.

The plaintiff in error offered no evidence outside of the patent and its recitals to connect the patentee with the warrantee, Nathaniel Brown, The learned court below rejected the recitals because the right of Dr. Ruston commenced with the very inception of the title by payment of the purchase money before the warrant issued, and hence the recitals were not evidence against Dr. Ruston and those claiming under him.

This question was ruled in Penrose vs. Griffiths, 4 Binney, 231, a leading case in Pennsylvania, as follows: "The rule of law is that a deed (patent) containing a recital of another deed is evidence of the recited deed, against the grantor and all persons claiming by title derived from him *subsequently.* What is the reason of this rule? It is this, the recital amounts to a confession of the party, and that confession is evidence against himself and those who stand in his place. But such confession can be no evidence against a stranger; it can be no evidence against one who claims by title derived

from the person making the confession, *before* the confession made, because he does not stand in the place of the person making the confession; he claims paramount the confession. One who has conveyed his right can by no subsequent confession effect the right which he has conveyed.

To the same effect are the following cases, all involving patents:

Diggs vs. Downing, 4 Serg. & Rawle, 353.
Smith vs. Webster, 2 Watts, 478.
Lewis vs. Bradford, 10 Watts, 76.
Ginrich vs. Foltz, 7 Harris, 40.
Brock vs Savage, 10 Wright, 87.
Green vs. Brennesholtz, 23 P. F. Smith, 426.

The same rule prevails in this court.

Marsh et al. vs. Brooks et al., 14 How., 513.
Same vs. Same, 8 How., 223.

In this latter case it is ruled that the recitals when evidence are not enough to show that the title is of an earlier date than the date of the patent which bears date 12th April, 1797, six months after the lien of the judgment of Clayland for use, &c., against Dr. Ruston in the Circuit Court of the United States, had attached to this land.

The patentee is trustee for the owner.

Hoffman vs. Bell, 61 Pa. 444.

The offer of plaintiff in error, No. 2, is as follows:

Defendant offers sale book of Commissioners of Columbia County, showing sale of Nathaniel Brown tract August 31, 1882, to C. G. Murphy, to be followed and taken in connection with deed of said Commis-

sioners to said C. G. Murphy, in pursuance of said sale, for said tract of land, dated 18th September, 1882; acknowledged same day.

The plaintiff objects to the defendant's offer, and assigns the following reasons in support of such objection:

1st. The evidence shows that the County Commissioners of Columbia County assessed and charged the Nathaniel Brown with taxes for the year 1838, 1839, 1840 and 1841, and that such taxes remaining unpaid, the said tract of land was returned to the Treasurer of said county charged with such taxes and duly sold to James Pleasants, and deed therefore made to said Pleasants, under whom the plaintiff, by sundry conveyances, claims title; that under such title the plaintiff and his grantors paid the taxes on said land for nearly forty years.

2nd. The deed contained in said offer is irrelevant and incompetent evidence against said plaintiff, as the defendant offers no evidence of title in the County Commissioners of Columbia County but the tax sale of 1828; that whatever title was acquired at such sale was divested by the tax sale of 1842, and the county had no title in 1882, and the defendant took no title by his deed from the Commissioners.

3rd. At the sale of 1882 the presumption had become conclusive that the taxes of 1826, 1827, and 1828 had been paid, and the land redeemed from the sale of 1828.

Objections sustained, evidence rejected, and bill sealed for defendant.

M W. Acheson, [Seal.]

The offer was to show that in 1828 the Nathaniel Brown was sold by the Treasurer to the Commissioners for taxes assessed prior thereto, and the Commissioners allowed this title to sleep until 1882, fifty-four years, when the Commissioners sold it to Murphy on the claim of title acquired at the sale in 1828. During this period of over half a century the county taxed this land, received the annual taxes from the owners, allowed the land to be sold by the Treasurer for unpaid taxes and treated the land in every respect as if the county had no claim to it.

By the 5th Section of the Act of 1815 (Pa.) 2 Purdon, 1682, provides that in all cases of unseated lands sold by the County Treasurer for taxes, if an amount equal to the taxes and costs shall not be bid it shall be the duty of County Commissioners to purchase the same for the use of the proper county. They shall provide a book in which shall be entered the name of the person as whose estate the same shall have been sold, the quantity of land and the amount of taxes it was sold for, and every such tract of land shall not thereafter, so long as the same shall remain the property of the county, be charged in the duplicate of the collector; but for five years next following such sale, if it shall so long remain unredeemed, the County Commissioners shall in separate columns in the same book, charge every such tract of land with reasonable county and road tax, according to the quality of said land, not exceeding in any case six dollars for every hundred acres.

By the 6th Section of same Act the owner has

five years in which to redeem by paying the taxes and costs due at time of sale, with the interest and also the taxes assessed thereon from year to year, &c.

And the 7th Section provides that if the lands are not redeemed within five years, it shall be lawful for the Commissioners to sell the same at public sale.

It will be seen that the statute did not allow lands purchased by the Commissioners to be charged in the duplicate of the proper collector, and thereby subject the land to a second sale. The purpose was to protect the county's title. But if the County Commissioners failed to discharge their duty and allow the land to be taxed as the lands of the owner, and upon return of the taxes unpaid by the collector to the Commissioners, the Commissioners certify these taxes to the treasurer, which they must do to authorize the treasurer to sell the land, and the treasurer sells the land to an innocent purchaser, the county get the taxes thus assessed, and if the County Commissioners could sell the county's title, they would not only get the taxes twice, but would be guilty of a fraud upon the purchaser at the treasurer's sale.

Such conduct on the part of an individual would be condemned by every principle of fair dealing and common honesty, and a county which is a corporate person and act by its Commissioners, who are representatives, is bound by the same rules and principles that govern individuals in their dealings with each other.

The Supreme Court of Pennsylvania have construed these statutes, and have treated the county as an individual, and held it to the same rule of morality.

Hunter vs. Albright, 5 Watts & Sergeant, 423.

The plaintiff's title was a warrant to John Little of the 28th December, 1774, for 200 acres, upon which a survey was made on the 12th of March, 1775, and duly returned. The land was taxed in the name of William Rawle for the years 1834-5 as unseated, and sold on the 11th June, 1839, to Samuel Albright, the plaintiff. The defendant's title was a warrant to Michael Capp of the 7th June, 1785, for 100 acres, upon which a survey was made on the 27th October, 1785, and duly returned. This survey interfered with and included seventy acres of the former survey of John Little, and this was the land in dispute. The tract in the name of Michael Capp was assessed with taxes for the years 1821-2-3, as unseated, and on the 14th October, 1830, was sold by the Treasurer and purchased by the Commissioners, who, on the 11th June, 1838, sold the same to John Thomas, who conveyed to the defendant. The learned Court, in his opinion, said:—In the present case, however, the land surveyed under the junior warrant was assessed with taxes as unseated, and sold on account thereof, and purchased by the Commissioners of the county, no one being willing to bid the amount of the taxes and costs for it, before there was an assessment made on the land sold under the elder warrant and survey; but during the time that the Commissioners held the land embraced by the junior warrant and survey, they caused the whole of the land within the limits of the survey made under the elder warrant

to be assessed as unseated, and sold on account of the taxes so assessed to the plaintiff below without any reservation or exception of any part thereof.

That the Commissioners had a right to restrict the limits of their purchase to that portion of the land embraced within the junior survey, cannot, I think, be questioned on any tenable ground, and I think it still less questionable, if possible, that by taxing that part of the land within the lines of the junior survey, while they were the owners of it, which was included within the elder survey as part and parcel of the latter, they must be considered as thereby disclaiming all right which otherwise they might have had under their purchase, to that part of the land surveyed under the junior warrant, which had been previously surveyed under the elder warrant. It must be so considered, for otherwise they had no right to assess or tax it as their property, or more properly, that of the county ; but as the property of the claimant or owner of the elder warrant and survey, they certainly had.

The necessary inference then is, that Albright by his purchase became the owner of the whole of the land included within the survey made in pursuance of the elder warrant in the name of Little. The Commissioners of the county, it is true, after the purchase by Albright, sold the whole of the land embraced within the survey made under the junior warrant; but had they a right, after having acted as they did, to sell that part of it embraced by the elder warrant and survey? Before they sold it they had assessed taxes on it as part of the tract held

under the Little warrant, and received those taxes out of the money arising from the sale made of it to Albright. And afterwards when they sold to John Thomas, under whom the plaintiffs in error claim, they, if they sold the part in dispute, of course charged it again with taxes, and got the same out of the purchase money received of Thomas; thus assessing and receiving taxes on the same land twice. Such conduct on the part of an individual would most unquestionably be condemned as unjust, and no one can doubt that the county, which is a corporate person, and acts by its Commissioners, who are its representatives, is bound by the same rules and principles that govern individuals in their dealings with each other. The Commissioners, therefore, after having purchased the land assessed under the Capp warrant, and while they held it by virtue thereof, by assessing and causing that part of it which is in dispute here to be sold to the defendant in error as part of the tract held under the Little warrant, must be considered as relinquishing all claim to it, and having no right to sell it afterwards to John Thomas. We, therefore, think that the court below was right in instructing the jury that the plaintiff was entitled to recover.

In the Diamond Coal Company vs. Fisher, 19 Pa. St., 267, the Court said: "In 1824 the county, by her taxing power, and through her taxing officers, had acquired a complete title to this land, subject only to the redemption right, having then one year to run. Then by an improper exercise of the same functions, by the same officers, she sold the land again, and Hautto bought it. In other words the county

in 1820 had an inchoate title to this land, and one year before it became absolute she sold it to Hautto, by a power which she had then no right to exercise. The question is at once suggested, what effect had the second sale upon the rights of the original owner? We answer, none at all. What right had he? Simply the right of redemption until 1825, and that could not be affected by any act of the county officers. But that right was not exercised in time. What then? The title under the first sale, in whomsoever it then existed, became absolute in 1825. Then the right of redemption was gone, and to allow it afterwards was merely matter of grace and not of right. It is answered, however, that it was allowed in 1830. True; but an allowance by grace could not affect any valid title previously acquired from the county. If the title of the county had become fully vested in others before 1830, then the county officers had no power to grant favors in relation to it.

Here, then, is the pinch of the main question; did the sale of 1824 vest in Hautto the title which the county acquired by the sale of 1820?

It is pure and self-evident morality, and therefore plain law, that no one shall lead another to do an act, and then claim for his own benefits that that act was unlawful or invalid; in other words, no man shall take advantage of his own wrong. Thus, when a man sells land which he does not own, and afterwards acquires the title; or when he acts as agent in selling his own land as the property of another; or when he sees his own land offered for sale as the property of another, and encourages the sale of it, he shall never be allowed to

use his own title to the injury of the person whom he has thus mislead; Rawle on Covenants, 341-5; 2 Ser. & R., 507; State Rep. 531, and cases there cited.

And there is another kindred principle, the justice of which is equally obvious; that he who voluntarily accepts the benefit of a traansaction, does thereby become a party to it; and shall not afterwards be allowed for his own profit, to allege its invalidity; 11 State Rep. 402, 408, and the cases there cited.

By the sale of 1824, the county obtained payment of several years taxes which she would have been entitled to claim upon a redemption of the first sale, (and which were paid again when the redemption was allowed) and she could not after that, and when her own title had become perfect under the first sale, disregard the rights of others obtained under the second sale, and grant favors inconsistent with them. On these principles it would seem plain that the sale of 1824 was effectual in vesting in Hautto the title which the county acquired by the sale of 1820, and that title became perfect and absolute in him in 1825, on the failure of the original owner to redeem according to law.

But it is objected, not that the county is not to be held by these rules of morality and law, but that the acts upon which the Hautto title depends were not the acts of the county, because, though done by the county officers, they were contrary to the directions of the Act of Assembly. True this irregularity did exist, but, though to divest the original owner, it is essen-

tial to follow the course prescribed by the Act of Assembly; yet so far as it affects the title of the county, that course has been treated as directory rather than essential:

Steiner vs. Coxe, 4 State Rep., 25.
Huston vs. Foster, 1 Watts, 478.

The same strictness is not required when the county is parting with its own title, as when it is divesting that of another. The case of

Hunter vs. Albright, 5 W. & Ser., 426,

shows that the county may part with its title to land in the very way pursued here, where that title was obtained in the collection of taxes."

See Miller vs. Sorg., 55 Pa. St., 225.

These cases have been recognized and affirmed by many subsequent cases, where the question of estopped is raised.

The third objection to the offer is that after so long a lapse of time between the sale to the Commissioners in 1828 and the sale by the Commissioners in 1882, without any evidence of claim during this time upon the part of the county to the land, the presumption had become conclusive that the taxes for 1826-7-8 had been paid and the land redeemed from the sale of 1828.

There was no evidence offered to show the county had made any claim to the land during this long period. It was held in Woodburn vs. The Farmers' and Mechanics' Bank, 5 Watts & Sergeant, 450, that "A ques-

tion of some moment incidentally occurs in this case, that is to say, whether a presumption of payment derived from lapse of time may not arise against taxes in our county rates. The maxim nullum tempus occurrit regi, has, it is true, been extended to the Commonwealth as an incident of sovereignty, but there is no reason why this maxim should be applied to a tax imposed for county purposes. Several cases have occurred of extreme hardship, which have directed our attention to this subject. I refer particularly to Robinson vs. Williams,(6 Watts, 281,) to which the attention of the Legislature is invited. It was decided after great deliberation and hesitation, and nothing but imperative sense of duty brought us to the conclusion to which we eventually came. Why may not a presumption of payment arise in this as in other cases between individuals? There is surely as much necessity for one as the other. And if it should so happen, that the fiscal concerns of the counties are neglected, why should an innocent person, a purchaser without notice for example, and without the means of acquiring it, except by great diligence, where counties are divided, have this land swept from him in payment of taxes of long standing? Would it be unreasonable, to presume they were paid so far as to prevent a sale of the land? Would it be unreasonable to hold, not only that the delay raises a presumption of payment, but that this is a presumption *juris de jure*.

In McLaughlin vs. Kain et al., 45 Pa. St. 113, Court held under the Act of 20th of March, 1812, authorizing County Commissioners to estimate taxes which had been paid by a settler of land under contract with a warrant-holder, and after deducting so much as

should have been paid by the settler, to sell the part belonging to the warrantee; such a sale made in 1838 for taxes paid by the settler from 1801 to 1807 is void and passes no title; for after so long an interval the taxes are presumed to be paid, and, if paid, the sale founded on them is invalid.

These authorities are sufficient to show the view the Pennsylvania Court has taken of this question.

The offer of Defendant in Error, No. 3, is as follows:

Defendant now offers the Treasurer's sale book for 1846, already in evidence, and under the head of sale by the Treasurer, on the 8th day of June, 1846, the following entries, to wit:

Warrantees or owners.	*Acres*	*Taxes.*	*Costs & Taxes*	*Purchase Money.*	*To whom Sold.*	*By whom redeemed and when.*
Nathaniel Brown	400	$14.81	$18.43	$18.43	.....	Taxes paid by Jas. Pleasants to C. F. Mann, Nov. 19, '47.

And in connection with this renew *their* offer of the sale by Commissioners and deed to defendant in 1882.

The plaintiff makes to the deed made to defendant in 1882 the same objections that were made to the next preceding offer. The entries in the Treasurer's sale book were read in evidence to show payment of the taxes on the 19th day of November, 1847, by Pleasants, the then owner of the land, as evidenced by the County Treasurer.

As the entry shows such fact alone, it does not aid the offer of the deed previously rejected by the Court.

Upon the book there appears on the next line below the entry of "Taxes paid by James Pleasants to C. F. Mann, Nov. 19, '47," the following, to wit: "Audited this year, Jan. 4, '48," which, by direction of the the Court, is added to the offer as part of the entry. Objections sustained. Evidence rejected and bill sealed for the defendant.

M. W. ACHESON. [SEAL.]

And also the sixth point of the plaintiff in error, raises the same question as the above offer, which is as follows:

6th. That if the jury find that the land in question was after the sale in 1842 to James Pleasants again sold to the Commissioners by the treasurer on the 8th day June, 1846, such sale divested any title acquired by said Pleasants at said former treasurer's sale, and the subsequent payment of the taxes for which the land was thus sold in 1846 by said Pleasants would not operate to reinvest him with the title, and therefore the plaintiff cannot recover upon the title claimed under the sale of 1842.

The question raised by the offer (not discussed under the second offer) is that conceding that James Pleasants purchased the Nathaniel Brown tract in 1842 and had a perfectly good title, nevertheless, the same land having been sold again at tax sale in 1846 and James Pleasants redeemed the same by paying the

taxes and costs, such redemption would not operate to reinvest him with the title claimed under the sale of 1842.

The Act of 1815 provides that upon the redemption the Commissioners shall reconvey all the county's title to the owner. The presumption is that public officers do their duty and this presumption stands as proof until the contrary is shown. The entry of "redemption" in our tax books is received as evidence of the fact; but the redemption is good and revests the title without a deed from the Commissioners.

City of Philadelphia vs. Miller, 49 Pa. State Rep. 456.

The right to redeem land sold at Treasurer's sale is exclusively in the owner: but if actually redeemed by another, it will enure to the benefit of the owner, and vest no title in him who redeems it, although he may have been a claimant of the land at the time.

Orr vs. Cunningham, 4 W. & S., 294.

"When the Commissioners do thus purchase unseated land, and within or after five years allow of its redemption, and convey it accordingly, this transaction, by its very nature, discharges the public duty, rescinds the Commissioners' title and revests that of the next preceding owner. If a stranger thus redeems, he discharges the public duty, without acquiring the title for himself:

4 W. & Ser., 298, 10 State Rep., 513.
Laird vs. Hiester, 24 Pa. St., 452.

"Unseated land sold for taxes in a senior warrantee's name, is redeemed by the payment of the taxes,

&c., by a junior interfering warrantee; the redemption enures to the benefit of the true owner."

"The party redeeming cannot defeat the redemption by withdrawing the money after the time for redemption has passed."

Lerwick et al. vs. Brotherline, 74 Pa. St. 149.

The title acquired by a purchaser at a Treasurer sale, whether the purchaser be the county or an individual, is defeasible The purchaser can make no use of the land nor convey it until after the time for redemption is past.

"If" James Pleasants redeemed from the sale of 1846, the title reverted to him as the owner.

But it appears from the book offered that the Nathaniel Brown tract was not sold in 1846 to anybody by the Treasurer, for under the head "to whom sold," no name appears as purchaser, and it is blank; and it further appears upon the face of the book that James Pleasants paid the taxes on November 19th, 1847. If the Treasurer had sold the land to any person, the name of the purchaser would have been written in the blank space under the heading "to whom sold." The book, therefore, was irrelevant and immaterial for the purpose for which it was offered.

The first, second and third points submitted to the court below, raise the question that by Dr. Ruston's paying the purchase money to the Commonwealth, at the time he took out the six warrants including Nathaniel Brown, raised no trust in favor of Dr. Rus-

ton by his paying certain amount of money at the time he took out the warrants, unless he paid the purchase money in full or the trust was evidenced by acts of ownership on part of Dr. Ruston or those claiming under him or some acknowledgment on the part of the warrantee.

These questions were raised and very fully discussed and decided by this court in Jane Henon, et al., vs. Philip Dater, et al., 120 U. S. 464, cited above. It was by this court held:

(1.) In Pennsylvania an estate held by warrant and survey, attended with the payment of the purchase money is considered in most respects the same in effect as the legal estate; and the State cannot affect such title by subsequent patent to a stranger.

(2.) Ejectment may be maintained upon a warrant and survey by the owner who paid the purchase money, without any conveyance from the person in whose name the application was made and the warrant issued.

(3.) Under a Pennsylvania statute copies of entries from the old purchase blotter in the land office of the State are *prima facia* evidence of the facts therein stated.

(5.) A recital in a patent of a prior conveyance to the patentee is not evidence against third parties to affect rights previously vested in them."

The purchaser was bound to pay the State for the number of acres the warrant called for before the war-